87-1638

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1988

DUANE WENDALL LARSON, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the district court's finding that at least some of the cocaine introduced at trial was not in closed containers was so clearly erroneous as to call for an exercise of this Court's supervisory powers?

II.

Whether the Court of Appeals should have conducted a de novo review of the district court's findings of fact that at least some of the cocaine introduced at trial was not in closed containers?

III.

Whether the Fourth Amendment to the United States Constitution permits the establishment of categories of "worthy" and "unworthy" containers?

IV.

Whether the initiation of a search by

a private party permits police officers to continue the search and to exceed the scope of the earlier private search without a search warrant?

V.

Whether advice by trial counsel to a criminal defendant to not participate at trial and to not permit any other counsel to conduct a defense constitutes ineffective assistance of counsel when the defendant follows that advice?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Duane Wendall Larson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The order of the district court, (App. 7-31) was not reported. The opinion of the Court of Appeals (App. 1-6) is reported at 833 F. 2d 758 (8th Cir. 1987). The Court of Appeals denied rehearing on January 27, 1988 (App. 84).

JURISDICTION

The order of the Court of Appeals denying rehearing and rehearing en banc was entered on January 27, 1988. This petition has been filed within sixty days of that date. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The

Constitutional provisions relevant to this petition are the Fourth Amendment prohibition against unreasonable searches and seizures and the Sixth Amendment guarantee that "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

STATEMENT

1.) During the afternoon of October 28, 1983, a female approached the front desk at the Howard Johnson's Motel in Burnsville, Minnesota. She registered and paid for one night's lodging in room 124. The room registration noted that the room would be occupied by two persons, although the second occupant was not identified.

The following morning, the female who had rented the room went to the front desk and arranged for her companion to be able to stay until 2:00 p.m., two hours past the normal checkout time. Later that afternoon a

motel maid found the room still occupied. The male occupant advised that he would be staying over and did not wish maid service.

Later in the afternoon of October 29, 1983, a motel employee noticed that there were unpaid telephone charges from room 124. Assistant Manager William Webster sent a bellman to room 124 to determine whether the room was still occupied. The bellman reported that there were grocery bags and empty bottles in the room. Uncertain as to whether the room was still occupied, Webster went to the room and admitted himself with his pass key.

After entering the room, Webster observed two grocery bags, one of which contained two plastic bags of white powder. After returning to the room with the Assistant Manager of the motel's restaurant for a second look, Webster summoned the Burnsville police. By the time Webster and the police went to the room, it was again occupied by the Petitioner.

After a conversation outside the motel room door during which Petitioner offered to pay the room rent and advised that he would not consent to a search of the room, the police obtained consent to enter from the motel manager. A warrantless search of the bags seen earlier by the Assistant Manager, and other bags which had not previously been in the room ensued. During the course of this search, the police opened sealed manila envelopes inside the bags which had not been in the room earlier. As a result, Petitioner was arrested and charged with possession of cocaine with intent to distribute.

2.) Petitioner hired a defense team of four attorneys. One of the attorneys was hired as local counsel. Two attorneys from Chicago, Raymond Smith and Ellen Robinson, were hired to perform suppression and other pretrial work. Attorney Oscar Goodman of Las Vegas was hired to be lead counsel at trial.

The record from a pretrial suppression hearing (PT-___) and at trial (TT-___) showed the following.

After entering the room and opening all of the bags and the sealed manila envelopes within some of the bags, the police arrested Petitioner, who was still standing just outside the door to the room (PT-135, App. 96). A police report, page 3 of which is reproduced in the Appendix (App. 85-89) showing that most of the seized powders had been in sealed manila envelopes had been supplied to defense counsel prior to the hearing (ST-72, App. 92-93). According to one of the officers who had made the actual seizures, the manila envelopes were in turn inside grocery bags (PT-134, App. 94-95). The evidence was placed in an evidence locker at the police station over the weekend.

Despite being supplied with a police report and testimony at the pretrial suppression hearing indicating that at least

some of the powders seized were inside opaque containers, which were in turn inside other opaque containers, defense counsel did not pursue the container issue. Instead, counsel moved to suppress solely on the grounds that Petitioner had a continuing privacy interest in the motel room despite the fact that the rental period had expired. This argument was rejected by the district court and later by the Court of Appeals. United States v. Larson, 760 F. 2d 852 (8th Cir. 1985), cert denied 106 S. Ct. 143.

3.) Trial began on February 2,1984. Petitioner's trial counsel, Oscar Goodman, failed to appear at trial. Goodman sent telegrams to the district court and to local counsel advising that he was in trial in Las Vegas. Acting on advice received from Goodman by telephone, the Petitioner advised the district court that he would not permit his other counsel to represent him at trial.

Petitioner's remaining counsel advised the district court that he would continue to represent Petitioner on the suppression issue (TT-4, App. 97-98). Based on Petitioner's instructions, counsel did not otherwise participate at trial.

The record at trial showed that a total of eleven drug or drug related items were introduced, five of which actually contained cocaine. The exhibits were as follows. Exhibit number 1 contained five hundred grams of cocaine. Exhibit number 2 contained one hundred twenty-five grams of cocaine. Exhibit number 3 contained two hundred fifty grams of cocaine. Exhibit number 4 contained five hundred grams of cocaine (TT-526, App. 139-140). Exhibit number 9 contained ten grams of a substance containing cocaine (TT-533, App. 144-145).

Exhibit number 5 contained two thousand twenty-eight grams of mannitol. Exhibit number 6 contained two thousand three hundred

seventy-eight grams of lactose (TT-530, App. 142-143). Exhibit number 7 contained two hundred nineteen grams of mannitol. Exhibit number 8 was a plastic cup containing about six grams of mannitol residue (TT-531, App. 143-144). Exhibit number 10 was a sifting device containing no residue (TT-533, App. 144-145). Exhibit number 14 was a scale.

The seizures of the Exhibits containing drugs were described as follows. "Item number 1 came from the grocery bag that was on the sink in the bathroom." Asked how he recognized the envelope which was a part of Exhibit number 1, officer Holden responded "I marked the item with the case file and the date, the time and I also wrote my name on the bag for identification." Just so there is no confusion between the envelope in which Exhibit 1 was originally seized and the police evidence bag, it should be noted that Holden was asked if his name and the

case number appeared anywhere else on the Exhibit. He responded, "Yes, it does, it appears at the top of the outside sealed bag." (TT-339, App. 114-115).

Holden described Exhibit number 2 as: "Item number 2 was also contained in the grocery bag on the sink in the bathroom along with items number 1 and 3." (TT-340, App. 116). Asked to describe how Exhibit number 2 was packaged, Holden stated, "The powder was bagged inside the zip lock bags here as was item number 1. The bag was inside the manila envelope." Government counsel then asked, "So, there's a manila envelope also contained in Government Exhibit 2?". Holden responded, "Yes, there is.". Holden went on to explain that the zip lock bags inside the manila envelope were in turn inside another paper bag which was then inside the paper bag with Exhibits 1 and 3 (TT-341, App. 117-118).

Exhibit number 3 was in the same grocery

bag as Exhibits number 1 and 2. Exhibit number 3 was double zip lock bagged and was in turn inside a manila envelope (TT-343, App. 118-119).

Holden described Exhibit number 4 as being "in one plastic zip lock bag, then inside this other plastic zip lock bag, and then together they were inside this brown paper bag." Asked where Exhibit number 4 had been found, Holden responded, "That was recovered on the floor of the motel room under the television set in another larger grocery bag." (TT-344, 345, App. 119-122).

Exhibit number 9, the last Exhibit containing cocaine, was described by Holden as "The white powder was inside one of the plastic bags. The plastic bag, in turn, was placed inside the other plastic bag, and then both of these were inside the paper bag." (TT-351, App. 127-128). Sergeant Schlueter gave a similar description of Exhibit number 9 (TT-373, 374, App. 137-138).

Other Exhibits were also seized from inside of containers.

Exhibit number 10, the sifter, was "found inside a plastic bag, which was in turn inside this paper bag." (TT-374, App. 137-138).

Finally, Exhibit number 14, the scale, "was inside the container, which was in turn inside another larger grocery bag." (TT-357, App. 130-131). Sergeant Schlueter confirmed this description (TT-369, App. 131-132).

In contrast to the Exhibits containing cocaine, and some of the other Exhibits, which were clearly in one or more opaque containers, Exhibits 5, 6, 7 and 8 were not so concealed. Exhibit number 5, which contained two thousand twenty-eight grams of mannitol, was "located on the bed in the motel room." (TT-347, App. 124-125). This fact was confirmed by Sergeant Schlueter (TT-371, App. 133-134). Exhibits 6, 7 and 8, which were, respectively, lactose, mannitol,

and a plastic cup, were "found once again on the bed in a Super Valu bag." (TT-348, App. 125-126). This was confirmed by Sergeant Schlueter, who added that "the top was open..." (TT-372, 373, App. 134-137). No description of opaque containers was given in regard to Exhibits 5, 6, 7 and 8.

Despite the fact that defense counsel was confronted at trial with overwhelming evidence that all cocaine introduced at trial had been found in warrantless searches of closed containers, counsel continued to urge suppression solely on the basis that Petitioner had continued to have a reasonable expectation of privacy in the motel room after the rental period had expired. Petitioner was convicted and sentenced to ten years imprisonment. The conviction was affirmed on appeal. United States v. Larson, supra, 760 F. 2d 852.

4.) After arriving at F.C.I., Sandstone,

Petitioner learned that under the clearly established law of this Court, a warrant is required to search closed containers. United States v. Chadwick, 433 U. S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977); Arkansas v. Sanders, 442 U. S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). As a result, Petitioner filed a motion to vacate sentence pursuant to Title 28 U.S.C. §2255 alleging ineffective assistance of counsel due to counsel's failure to raise the container search issue. Petitioner also alleged that counsel was ineffective as a result of attorney Goodman's advice not to let other counsel represent Petitioner at trial.

5.) The district court ordered the government to respond. Surprisingly, the government did not even attempt to dispute the contention that all drugs introduced at trial were the fruits of warrantless searches of closed containers. Rather, the government

argued waiver because Petitioner had not raised the container issue before or at trial. Therefore, according to the government, Petitioner was barred from raising the issue in a motion pursuant to §2255. Alternatively, the government sought to rely on the Manager's consent to search the room as justification for a search of Petitioner's containers. The government did concede that if attorney Goodman had advised Petitioner not to allow other counsel to defend him at trial, "Goodman should be disbarred for unconscionably unethical practice."

6.) The magistrate appears to have agreed with Petitioner that the cocaine was in closed containers. "If attorney Smith was unaware until midway through trial that the cocaine was concealed inside sealed envelopes, his ignorance can only be attributed to Larson's failure to inform him of that fact." (Report and Recommendation at 21, App.

65-67). - The magistrate concluded that Petitioner's failure to tell counsel that the cocaine was in containers relieved counsel of the obligation to raise the container search issue (Report and Recommendation at 22, App. 67-68). The magistrate also concluded that this Court's decision in Stone v. Powell, 428 U. S. 465, 96 S. Ct. 3039, 49 L. Ed. 2d 1067 (1976) effectively overruled Kaufman v. United States, 394 U. S. 217, 22 L. Ed. 2d 227, 89 S. Ct. 1068 (1969) and that as a result federal prisoners could no longer raise Fourth Amendment issues under §2255 if they had been afforded a full and fair opportunity to litigate those claims at trial. (Report and Recommendation at 4-12, App. 38-52).

Alternatively, the magistrate found that the container issue was merely a variation of the claim of a continued right to privacy in the motel room which was raised at trial and on direct appeal because all

suppression issues are claims for the same relief. The magistrate therefore concluded that the failure to raise the claim at trial constituted an intentional bypass of an available remedy and thus constituted waiver. (Report and Recommendation at 12-14, App. 52-56). The magistrate accepted, for purposes of the §2255 motion, Petitioner's assertion that attorney Goodman advised Petitioner not to let other counsel defend him at trial and declined to make a finding as to prejudice at trial because the district court was in a better position to make that assessment. (Report and Recommendation at 17-20, App. 59-65).

7.) Petitioner filed a timely objection to the Report and Recommendation. It is difficult to say precisely how much of the Report and Recommendation the district court adopted. The district court found itself "in basic agreement with the Magistrate on most

issues." (Order at 3, App. 10-11).

In perhaps its most critical, and least explained finding, the district court held that "at least some of the cocaine was in plain view rather than in closed and opaque containers. See supra, note 3." (Order at 7, App. 18-19). Note 3 (Order at 5, App. 14) states "The trial testimony revealed that when the hotel manager looked into the grocery bags, he saw plastic bags inside, filled with white powder. Not all the plastic bags were in manila envelopes and the tops of some of the grocery bags were open. Pretrial (P.T.) (Vol.) I: 62-3, 134. Trial Transcript (T.T.) II: 307-8, 312, 336, 351, 373."

The district court appears to have adopted the magistrate's finding that Stone v. Powell, supra, overrules Kaufman v. United States, supra, thereby prohibiting a federal prisoner from raising Fourth Amendment issues on collateral attack where there has been a full and fair opportunity to raise

them at trial. However, the district court's ultimate findings do not rest on that ruling. (Order at 5-6, App. 15-18).

Also accepting for purposes of the §2255 motion Petitioner's assertion that attorney Goodman had advised Petitioner not to permit other counsel to defend him at trial, the district court found that Petitioner had waived that issue becaue the district court had warned Petitioner of the danger of following that course of action. (Order at 7-11, App. 18-26).

8.) On appeal, the government once again declined to dispute Petitioner's contention that all of the cocaine introduced at trial was taken from closed containers. The Eighth Circuit Court of Appeals disposed of the case in a brief per curiam opinion. Accepting the district court's finding that at least some of the cocaine was in plain view without any apparent independent review

of that issue, the Court of Appeals went on to add a new element. It found, with no apparent support in the record, that the police search had been merely a follow up to the earlier private search. The Court of Appeals therefore concluded that Petitioner's underlying evidentiary claim was without merit. Apparently as an alternative holding, relying on United States v. Mefford, 658 F. 2d 588, 591-92 (8th Cir. 1981), the Court of Appeals held that there was no reasonable expectation of privacy in a paper bag that was not stapled, taped or tied shut. The Court of Appeals found that counsel's failure to raise the container issue did not constitute ineffective assistance of counsel. (Slip opinion at 2, App. 3-5). The Court of Appeals did not discuss the fact that in order to find the cocaine, the police had to open the sealed manila envelopes which were inside the grocery bags.

Addressing the issue of attorney Good-

man's advice not to let other counsel defend him at trial did not constitute ineffective assistance of counsel because of the overwhelming evidence and the fact that the district court had warned Petitioner about the dangers of not utilizing standby counsel (Slip opinion at 5, App. 5). Having found no prejudice because of its acceptance of the district court's factual finding, the Court of Appeals did not address the issues of waiver or whether Stone v. Powell, supra, overrules Kaufman v. United States.

JURISDICTION BELOW

The district court's jurisdiction was based on Title 28 USC, §2255. The Court of Appeals' juriscition was based on Title 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

1.) THE DISTRICT COURT'S FACTUAL FINDING THAT AT LEAST SOME OF THE COCAINE USED TO CONVICT PETITIONER WAS NOT IN CLOSED

CONTAINERS IS SO CLEARLY ERRONEOUS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

This Court should grant review of the first question presented, dealing with the issue of whether the district court's factual finding that at least some cocaine was in plain sight was clearly erroneous, because the record is so overwhelmingly clear that all cocaine introduced at trial was taken from closed containers that the result in this case to date comes within the provisions of Supreme Court Rule 17.1(a), which calls for review of cases which have "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

As Petitioner has clearly demonstrated in the statement of facts, the record conclusively proves that Exhibits 1, 2, 3, 4 and 9, the only Exhibits containing cocaine,

were seized during warrantless searches of closed containers. As shown below, the district court's finding that at least some cocaine was in plain view is the result of the district court's confusion and failure to distinguish between cocaine and non-narcotic white powder. The Court of Appeals' failure to conduct its own review of the record has perpetuated that error and has resulted in a miscarriage of justice.

The district court's finding that "at least some of the cocaine was in plain view rather than in closed and opaque containers. See supra, note 3." (Order at 7, App. 18-20) relies on certain specified pages of the record: PT-62-3 (App. 90-92); PT-134 (App. 94-95); TT307-08 (App. 99-101); TT-312 (App. 104-105); TT-336 (App. 113-114); TT-351 (App. 127-128); and, TT-373 (App. 136-137).

An examination of the cited references shows the following. PT-62-63 (App. 90-92) involves testimony by the Assistant Manager

William Webster that he looked into two grocery bags, and that the first contained empty liquor bottles and the second contained white powder in clear plastic bags. Webster did not testify that he had seen cocaine, most likely because "I wouldn't recognize illegal narcotics if I saw them." (TT-63, App. 91-92). Nor did Webster mention manila envelopes or the plastic bags being inside smaller paper bags, as testified to by the officers regarding each Exhibit containing cocaine.

PT-134 (App. 94-95) involves testimony by officer Holden that "Several of the paper bags (earlier described as grocery bags) contained plastic bags or envelopes inside the paper bags, and there was various white powders inside of the plastic bags." This is, of course, the same officer Holden whose much more detailed, Exhibit by Exhibit, trial testimony is set forth in the statement of facts. That testimony makes it

quite clear that each and every Exhibit containing cocaine was in one or more opaque containers and was then in turn inside a larger grocery bag, which is itself an opaque container.

TT-307-08 (App. 99-101) is the trial testimony of Assistant Manager William Webster. As he did in the pretrial hearing, Webster testified that he had looked into two, and only two, grocery bags. The first contained empty liquor bottles and the second contained a clear plastic bag of white powder which "laid flat in the shopping bag, maybe an inch or inch and a half tall." and "The bag was full of it.". At TT-312, Webster went on to explain that when he returned with Mary Jo Kraft, the Assistant Manager of the motel's restaurant, he removed the clear plastic bag he had seen earlier from its grocery bag and discovered "there was more than one plastic bag in the grocery bag." The second plastic bag was "almost exactly

the same." Asked if he saw anything else in the room, Webster replied "No." (TT-318, App. 106-107). Neither Webster nor Mary Jo Kraft mentioned double or triple zip lock bags or manila envelopes. Webster stated that both bags were full. Exhibits number 5 and 6 contained over two thousand grams each (TT-530, App. 142-143). Both were single bagged. Exhibits 1 and 4 each contained only five hundred grams and Exhibits 2 and 3 contained only one hundred twenty-five and two hundred fifty grams respectively (TT-526-527, App. 139-141).

TT-336 (App. 113-114) is testimony by officer Holden that "there were three plastic bags inside a grocery bag in the bathroom. Webster had seen only cough drops in the bathroom. (TT-309, App. 102-103). The testimony is obviously a generalized discussion of Exhibits 1, 2 and 3 which was greatly amplified in Holden's later testimony at TT-339-341 (App. 114-118), which

clearly shows that those Exhibits were in opaque containers.

TT-351 (App. 127-128) is also officer Holden's testimony. It references Exhibit number 9 in terms of plastic bags. However, as shown in Holden's testimony on that very page and in Sergeant Schlueter's testimony (TT-373-74, App. 136-138), the plastic bags were inside a paper bag.

As TT-372 (App. 134-135) makes clear, the reference at TT-373 (App. 136-137) to an open grocery bag with clear plastic bags in it is to the non-cocaine Exhibits, numbers 6, 7 and 8. The record here is exceedingly clear. All cocaine introduced into evidence was seized in warrantless searches of closed containers. The district court's finding to the contrary is clearly erroneous. The Court of Appeals' obvious failure to conduct its own review of the record has deprived Petitioner of an effective habeas remedy. This Court should order the government to

finally take a position as to whether the cocaine introduced into evidence was taken from closed containers. Depending on the government's response, the Court should then either review the record or remand to the Court of Appeals in light of the government's admission.

2.) BECAUSE OF THE HISTORICAL IMPORTANCE OF THE WRIT OF HABEAS CORPUS IN RELEASING PRISONERS FROM ILLEGAL CONFINEMENT, APPELLATE REVIEW OF HABEAS CORPUS PROCEEDINGS SHOULD BE DE NOVO.

Petitioner fully expected to be required to meet the burden of demonstrating in the Court of Appeals that the district court's factual findings were clearly erroneous. Petitioner met that burden with the same clear evidence from the record that has been set forth in this petition. However, it is obvious from the brief per curiam opinion of the Court of Appeals that it merely accepted the district court's factual finding at face value rather than

conducting its own examination of the record. "The district court found some of the seized drugs in the grocery bags were in plain view and some were obtained during a police search that followed a private search conducted by the ownder of the premises. Thus the search of the bags challenged by Larson was not invalid under the fourth amendment." (Slip opinion at 2, App. 3).

While an unsuccessful habeas litigant certainly should expect to have to show on appeal that the factual findings of a district court were clearly erroneous, there should at least be a review by the Court of Appeals of challenged findings of fact. This is particularly true of habeas corpus proceedings because of the historical function of what this Court has often termed "The Great Writ" in releasing prisoners from illegal confinement. In this case, no review of the challenged factual findings was made. They were accepted at face value by the

Court of Appeals. Such summary, per curiam dispositions have no place in habeas corpus proceedings, particularly where Constitutional issues are involved. Commissioner of Internal Revenue v. McCoy, 484 U. S. ___, 98 L. Ed. 2d 2, 8, 108 S. Ct. ___ (1987) (dissenting from denial of certiorari).

At least one Circuit has found the appropriate standard for review of habeas corpus proceedings to be de novo. Kim v. Villalobos, 799 F. 2d 1317, 1319 (9th Cir. 1986). It does not appear that the Eighth Circuit has an announced or required standard of review for habeas corpus cases. There should be such an established standard for review of habeas corpus in order to insure protection of its important function in our system of justice. This Court should set that standard as de novo review.

3.) THE COURT OF APPEALS' OPINION MUST BE REVERSED BECAUSE THE CONSTITUTION DOES NOT SANCTION THE ESTABLISHMENT OF

CLASSES OF "WORTHY" OR "UNWORTHY" CONTAINERS.

Relying on an Eighth Circuit case which was submitted to the panel just prior to this Court's decision in Robbins v. California, 453 U. S. 420, 69 L. Ed. 2d 744, 101 S. Ct. 2841 (1981), the Court of Appeals held that grocery bags are a Constitutionally unworthy container. (Slip opinion at ?, App. 3-4). It is doubtful that the case relied on, United States v. Mefford, 658 F. 2d 588, 591-92 (8th Cir. 1981), was good law even when it was announced. Since that time several decisions of this Court and other Circuits have cast considerable doubt on the validity of Mefford.

Mefford was released on September 8, 1981. On July 1, 1981, after Mefford was argued, this Court decided Robbins v. California, supra. While it is true that Robbins was soon overruled by New York v. Belton, 453 U. S. 454, 69 L. Ed. 2d 768, 101 S. Ct.

2861 (1981), Belton rested on the premise that there was no principled reason to require police officers to obtain a search warrant for containers found within a vehicle where they had probable cause to make a search of the vehicle itself. Belton did not in any way alter that portion of Robbins which found that a Constitutional distinction between "worthy" and "unworthy" containers was not permissible.

Since Mefford, a number of other cases have found any container which conceals its contents to be "worthy" of Fourth Amendment protection. "One point on which the Court was in virtual unanimous agreement in Robbins was that a constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve into a series of cases in which paper bags, locked trunks, lunch buckets and orange crates were placed on one side of the line or the other, the

central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantee of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or a knotted scarf claim equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case." United States v. Ross, 456 U. S. 798, 72 L. Ed. 2d 572, 592, 102 S. Ct. 2157 (1982) (emphasis added). "What one person may put into a ~~suitcase~~, another may put into a paper bag." Robbins v. California, supra, (emphasis added).

The Eighth Circuit's opinion here is in clear conflict not only with earlier decisions of this Court, but also with the Ninth Circuit's interpretation of United States v. Chadwick, supra, and Arkansas v. Sanders,

supra. In United States v. Salazar, 805 F. 2d 1394, 1398 (9th Cir. 1986), the Ninth Circuit found that those cases and United States v. Ross, supra, compelled the conclusion that a closed paper bag, even though not stapled or tied, enjoyed the same protection as any other container.

Similarly, in United States v. Owens, 782 F. 2d 146, 149-50 (10th Cir. 1986), a case remarkably similar to the present case, the Tenth Circuit held that the police could seize: "marijuana cigarettes, white powder and drug paraphernalia (that) were in plain view" but that "Even if Pebbletree had a legal right to evict [the defendant] in order to clear his room for the next occupants, neither it nor the police had any right to search his luggage or the other closed containers." because "Owens had a reasonable expectation of privacy ...in the contents of the closed bag inside the dresser drawer." United States v. Owens, supra, 786 F. 2d at

149-50.

The case for Constitutional protection is even more compelling where, as here, the police not only opened paper bags, but the sealed manila envelopes as well. For reasons which are not apparent from the Eighth Circuit's opinion, it saw no need to address the separate issue of the sealed manila envelopes.

There does not appear to be any principled reason why the paper bags in issue here, much less the sealed envelopes, are any less entitled to the protection of the Fourth Amendment than the suitcase in Sanders or the trunk in Chadwick. This concept of the Constitutional right of privacy in any container which conceals its contents has been reaffirmed in Texas v. Brown, 460 U. S. 730, 75 L. Ed. 2d 502, 519, 103 S. Ct. 1535 (1983) and Arizona v. Hicks, ___ U. S. ___, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987).

Because the Court of Appeals decision in this case is in conflict with prior decisions of this Court and with those of at least two other Circuits, the Court should grant certiorari as to the third question presented. Any other course will leave the law of container searches in the Eighth Circuit in conflict with the law of this Court and the rest of the country.

4.) THE COURT OF APPEALS' OPINION IMPERMISSIBLY PERMITS SUBSTANTIAL POLICE EXPANSION OF PRIVATE SEARCHES AND IS THEREFORE CLEARLY IN CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

Without in anyway explaining its reasoning, the Court of Appeals found that the police conduct in issue here was permissible because it did no more than follow up on the earlier private search by the motel employees.

Once again, the record is quite clear. Assistant Manager Webster looked into two grocery bags which were on a table in the

bedroom portion of the motel room. One of those bags contained empty liquor bottles and one contained two clear plastic bags of white powder. (PT-62-63, App. 90-92). Webster again looked into the grocery bag with the clear plastic bags of white powder when he returned to the room with Mary Jo Kraft, the Assistant Manager of the motel's restaurant. Neither Webster nor Kraft ever mentioned seeing smaller bags or manila envelopes in the bag containing the clear plastic bags of white powder. When asked if he had seen anything other than the two bags he had looked into in the room, Webster replied "No.". (TT-311-312, App. 103-105).

Webster did not look into any other bags because on his first two trips to the motel room, without the police, he did not see any other bags in the room. He had particularly noted there was nothing else in the room except some cough drops on the

counter in the bathroom. (TT-309, App. 102-103). However, when he entered the room with the police, there were additional bags in the room. (TT-318, App. 106-107). The police helped themselves to all the bags in the room. (TT-319,107-108). They found the scale (Exhibit #14) inside a black plastic case inside a grocery bag which had not been in the room when Webster had been there earlier. (TT-320, App. 108-109); TT-356-357 (App. 128-131).

That the police went far beyond the search of the two bags examined by Webster is further demonstrated by the testimony of officer Holden. He located Exhibits 1, 2 and 3 in a grocery bag in the bathroom. (TT-336, App. 113-114), an area Webster had specifically noted contained only cough drops. (TT-309, App. 102-103). Unlike the clear plastic bags seen by Webster and Kraft, the plastic bags found in the bathroom area were in turn inside manila envel-

opes, which were in turn inside the grocery bag. (TT-340-343, App. 115-119). Exhibit number 4 was also located by Holden. Unlike the otherwise unconcealed plastic bags seen by Webster, Exhibit number 4 was not only in a grocery bag, it was also inside a smaller brown paper bag within the grocery bag underneath the television set. (TT344-345, App. 119-122). Webster had not examined any bags under the television set. Exhibit number 9 was contained in two zip lock bags and was then in turn inside a paper bag under the television set. (TT-351, App. 127-128; TT-373-374, App. 136-138).

This Court's controlling case on private searches is United States v. Jacobsen, 466 U. S. 109, 113-115, 104 S. Ct. 1652, 80 L. Ed. 2d 285 (1984). The rule of Jacobsen is quite clear. While the police may avail themselves of what has been given to them by a private party, they may not exceed the scope of the private search without a warrant.

See United States v. Jacobsen, supra, 80 L. Ed. 2d at 98, n. 17. "We reject Justice White's suggestion that this case is indistinguishable from one in which the police simply learn from a private party that a container contains contraband, seize it from its owner and conduct a warrantless search, which as Justice White properly observes would be unconstitutional." In this case, the police not only exceeded the scope of Webster's earlier search, but at the time of the police search and seizure the containers were no longer under the control of the motel employees. Petitioner had by then returned to the room and the containers were clearly under his dominion and control.

In this case, the record is not only conclusive that the police searched a number of bags not previously examined by Webster or Kraft, it also shows that even the bags examined earlier by motel personnel

were, by the time the police arrived, no longer even remotely under the control of the motel employees, they were taken from Petitioner.

This expansion of the earlier private search cannot be regarded as harmless. As the record clearly demonstrates, it was only after the police had exceeded the scope of the earlier private search that they began finding the cocaine which was ultimately used to convict the Petitioner.

Because the Court of Appeals' opinion clearly sanctions an unprecedented police expansion of an earlier private search, it is in conflict with the controlling decision of this Court. For that reason, this Court should grant certiorari on Petitioner's fourth question.

5.) ADVICE BY COUNSEL WHO CANNOT APPEAR AT TRIAL THAT A CRIMINAL DEFENDANT SHOULD NOT LET OTHER COUNSEL DEFEND HIM IS SO EGREGIOUSLY INEFFECTIVE THAT A CRIMINAL DEFENDANT WHO FOLLOW THAT ADVICE HAS

BEEN DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals found that given the overwhelming evidence at trial, and the fact that the district court had warned Petitioner of the dangers of following attorney Goodman's advice, Petitioner could show no prejudice from not participating at trial and not letting standby counsel defend him. (Slip opinion at 3, App. 4-5). This ruling raises two significant issues under the circumstances of this case. The first is whether, in a situation in which the defendant is totally unrepresented at trial, the appropriate standard is that found in Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) or that found in United States v. Cronic, 466 U. S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (9184). The difference, of course, is that while Strickland requires a showing of actual prejudice, Cronic presumes prejudice where there has been a fundamental breakdown

in the adversarial process or where counsel has been prevented from assisting his client during a critical stage of the proceedings. The second crucial issue implicit in the Court of Appeals' finding is whether a criminal defendant who relies on and follows the advice of counsel waives a Constitutional right when he relies on the egregiously ineffective advice of counsel instead of the contrary advice of the district court.

Petitioner alleged, and the district court accepted as true, that when the district court denied a continuance in order to permit attorney Goodman to try the case, Goodman advised Petitioner not to let other counsel defend Petitioner at trial because if Petitioner was convicted, a new trial would be ordered by the Court of Appeals and Goodman would defend Petitioner at the new trial. As a result, other than attorney Smith's objections to the introduction of evidence on the same grounds which had been

denied in the pretrial suppression motion, Petitioner was completely unrepresented at trial.

In finding no demonstrable prejudice, the Court of Appeals obviously applied the Strickland standard rather than the Cronic standard. Under either Strickland or Cronic, a defendant must show that counsel's advice or conduct fell below an objectively reasonable standard for counsel practicing criminal law.

There can be little doubt that in this case attorney Goodman's advice to forego representation at trial because doing so would result in a new trial was far below any objective standard of reasonableness. By the time the advice was given, in early 1984, it had long since been established that district courts have broad discretion in granting or denying continuances and that the district court's ruling will only be reversed for abuse of discretion. Morris v.

Slappy, 461 U. S. 1, 103 S.Ct. 1610, 1616, 75 L. Ed. 2d 610 (9183); Ungaru v. Sarafite, 376 U. S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (9164).

The facts in this case were such that there was absolutely no chance that a denial of a continuance would result in reversal. As the Court of Appeals found on direct appeal, counsel had been notified of the trial date well in advance. The request for a continuance was made only two days before trial was scheduled to start. The Court of Appeals found that the circumstances demonstrated a lack of diligence by defense counsel. United States v. Larson, supra, 760 F. 2d at 856-57. Counsel's advice was, therefore, completely outside the standard of objectively reasonable advice required of counsel in criminal cases. The government described the situation here well. Counsel who would advise a client to forego his one chance of presenting a defense on the repres-

entation that a new trial would result has engaged in unethical conduct.

It is at the second stage of inquiry that Strickland and Cronic diverge. Where the claim of ineffective assistance involves counsel's specific performance or non-performance, the defendant must make a showing of specific prejudice. Strickland, supra, 466 U. S. at 686. However, where counsel is absent or is prevented from assisting the defendant during a critical stage of the proceedings, or fails to subject the prosecution's case to adversarial testing, then prejudice is presumed. Cronic, supra, 466 U. S. at 659.

In this case, the Cronic standard is clearly the appropriate one. As a direct result of counsel's advice, Petitioner was totally unrepresented at trial. Any greater breakdown in the adversarial process is hard to imagine. That breakdown occurred as the direct result of Petitioner's reliance on

the advice of his retained counsel.

The district court and the Court of Appeals appear to have held that because the district court advised Petitioner of the danger of following counsel's advice, Petitioner waived the right of effective assistance of counsel. Such a finding implicitly holds that a criminal defendant is bound to follow the advice of a trial court rather than counsel's advice when there is a conflict.

The proposition that a criminal defendant should disregard the advice of counsel and follow the advice of the district court is unsupported by any case law of which Petitioner is aware. Courts, no matter how well intentioned, are not partisan advocates. In other contexts, this Court has recognized the inherent reasonableness of a client following his counsel's advice. United States v. Boyle, 469 U. S. 241, 259, 83 L. Ed. 2d 622, 631, 105 S. Ct. 687 (1985). Petit-

ioner's reliance on the advice of counsel should, therefore, not be construed to be a waiver of the right to effective assistance of counsel.

Even if this case were to be judged on the Strickland standard, with its requirement of a showing of prejudice, this Court should find that Petitioner was denied effective assistance of counsel by virtue of the fact that counsel's advice not to permit other counsel to conduct a defense at trial. The record discussed in the statement of facts clearly shows that the evidence used to convict Petitioner was seized in warrantless searches of closed containers. Had counsel been actively participating at trial, it is highly probable that this fact would have become even more obvious than it already was and suppression of the critical evidence would have been ordered when the proper motion was made, bringing about a different result.

At the very least, had the subject of the manner in which the seizures were made been more fully explored on the record by virtue of counsel's participation in proper cross examination, the district court's reliance on the one sided government presentation of evidence at trial would not now be the basis for the district court's clearly erroneous factual finding that not all of the cocaine introduced at trial was taken in warrantless searches of closed containers.

Because the Court of Appeals applied the wrong standard to Petitioner's claim of ineffective assistance and because the Court of Appeals overlooked the ovvious prejudice on the issue of suppression because it did not conduct its own review of the record, this Court should grant certiorari on Petitioner's fifth question.

CONCLUSION

The district court's finding that at

at least some of the cocaine introduced at trial was in plain sight is so clearly erroneous and the failure of the Court of Appeals to correct that error so far sanctions a departure from the usual and accepted course of judicial proceedings that they require an exercise of this Court's supervisory power.

In order to prevent such occurrences in the future and to insure meaningful review of habeas corpus proceedings, this Court should find that de novo review is required in habeas corpus cases.

The Court of Appeals' establishment of "worthy" and "unworthy" classes of containers is not sanctioned by the Fourth Amendment and is in conflict with the settled law of this Court and that of other Circuits. The same is true of the Court of Appeals' finding that once private persons have begun a search, the police may not only proceed but may greatly expand the scope of the

earlier private search.

Counsel's advice not to permit other attorneys to defend Petitioner at trial was so egregious as to call for application of the Cronic standard rather than the Strickland standard, and in any case Petitioner has shown actual prejudice.

For all of the above reasons, this Court should grant certiorari to review this case.

DATED this _____ day of March, 1988.

Respectfully submitted,

/s/_____
Francis L. Goodwin
Suite 300-Badgerow Building
Sioux City, Iowa 51102
Phone: (712) 258-6555

Attorney for Petitioner Larson

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Petition for Writ of Certiorari, together with Appendices, on counsel for the oppsoing party by depositing same in the United States mail, with postage prepaid, addressed to:

Office of the Solicitor General
United States Department of Justice
Washington, D. C. 20530

DATED this _____ day of March, 1988.

Francis L. Goodwin
Suite 300-Badgerow Building
Sioux City, Iowa 51102
Phone: (712) 258-6555

Attorney for Petitioner Larson

87-1638

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1988

DUANE WENDALL LARSON, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITIONER'S APPENDIX

Francis L. Goodwin
Attorney at Law
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Sioux City, Iowa 51102
Phone: (712) 258-6555

Counsel for Petitioner

INDEX TO APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5307

Duane W. Larson,	*	Appeal from the
	*	United States
Appellant,	*	District Court
	*	for the Dist-
v.	*	rict of Minn-
	*	esota
United States of America,	*	
	*	
Appellee.	*	

Submitted: October 23, 1987

Filed: November 25, 1987

Before McMILLAN, FAGG, and BOWMAN, Circuit Judges

PER CURIAM.

Duane Wendall Larson appeals pro se from the district court's order denying his petition for a writ of habeas corpus under 28 U.S.C. §2255. We affirm.

Larson was convicted and sentenced on a count of an indictment charging him with

possessing cocaine with intent to distribute and aiding and abetting. See 21 U.S.C. §841 (a)(1); 18 U.S.C. §2. A full description of the facts relating to the offense is set forth in this court's opinion affirming Larson's convictions. See United States v. Larson, 760 F. 2d 852, cert denied, 474 U. S. 849 (1985). Larson's habeas petition contained six separate grounds for relief, three of which he argues on appeal. Larson contends: (1) evidence contained inside paper grocery bags was illegally seized; (2) he received ineffective assistance of counsel from one attorney who failed to object to the admission of evidence obtained in the search of the paper bags and from another attorney who advised him not to participate at trial; and (3) his presentence investigation report (PSI) contains information improperly obtained from the grand jury. We conclude none of these contentions entitle Larson to habeas relief.

Larson did not raise the fourth amendment claim challenging the warrantless police search of the paper grocery bags before or during trial. Thus, he is barred from raising the claim unless he can show cause excusing the procedural default and actual prejudice. United States v. Frady, 456 U. S. 152, 167-68 (1982); United States v. Johnson, 707 F. 2d 317, 320 (8th Cir. 1983). The district court found some of the seized drugs in the grocery bags were in plain view, and some were obtained during a police search that followed a private search conducted by the owner of the premises. Thus, the search of the bags challenged by Larson was not invalid under the fourth amendment. See United States v. Newton, 788 F. 2d 1392, 1394 (8th Cir. 1986) (plain view doctrine); United States v. Jacobsen, 466 U. S. 109, 113-15 (1984) (police search within scope of private search not a fourth amendment violation); United States v. Mefford, 658 F. 2d 588, 591-

92 (8th Cir. 1981) (no expectation of privacy in paper bag not sealed with tape, staples or string), cert denied, 455 U. S. 1003 (1982). Because this underlying evidentiary claim is without merit, Larson has failed to demonstrate actual prejudice from the introduction of this evidence. See Johnson, 707 F. 2d at 323.

In order to prevail on his claim of ineffective assistance of counsel, Larson must show the legal representation he received fell below an objective standard of reasonableness and that there is a reasonable probability, but for these unprofessional errors, the result of his trial would have been different. See Kimmelman v. Morrison, 477 U. S. ___, 106 S. Ct. 2574, 2583 (1986); Strickland v. Washington, 466 U. S. 668, 687-88, 694 (1984).

First, in view of our conclusion Larson's fourth amendment claim lacks merit, the failure of Larson's counsel to raise the issue

does not constitute ineffective assistance. See Johnson, 707 F. 2d at 323. Second, the advice of Larson's other counsel no to participate at trial will not support an ineffective assistance claim in the circumstances of this case. Almost three pounds of pure cocaine were seized in the searched room occupied by Larson. In addition, Larson had access to alternate counsel from whom he could have sought advice, and the district court repeatedly warned Larson he was waiving constitutional rights by voluntarily choosing not to participate. Under these conditions, Larson did not receive ineffective assistance of counsel.

Finally, Larson argues information from his PSI was improperly obtained from grand jury records. While both direct and indirect disclosure of grand jury material is prohibited, only information that reveals what transpired in the grand jury room is protected from disclosure, and not all future

revelations to proper authorities are foreclosed. See In Re Grand Jury Matter, 682 F. 2d 61, 63 (3rd Cir. 1982). After reviewing the record, we conclude Larson's argument on this point is purely speculative and does not provide grounds for habeas relief.

We have thoroughly reviewed the record and Larson's contentions. We affirm the district court's denial of Larson's petition.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[TO BE PUBLISHED]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Duane Wendall Larson,
Petitioner,

vs.

United States of America,
Respndent.

MEMORANDUM OPINION AND ORDER

Civ. 4-86-483
Crim. 4-83-84

Petitioner Duane W. Larson was convicted of one count alleging possession of approximately three pounds of essentially undiluted cocaine with intent to distribute and aiding and abetting. He was sentenced to ten years imprisonment and a $25,000 fine. His conviction was affirmed, after which he began to serve his sentence. United States v. Larson, 760 F. 2d 852 (8th Cir.), cert denied, 106 S. Ct. 143 (1985).[1/]

Larson has petitioned for relief pursuant to 28 U.S.C. §2255. He seeks to have

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1/ Larson also pleaded guilty before the Honorable Edward J. Devitt to one count of tax evasion. A five year sentence was imposed, and he is now serving an aggregated sentence of fifteen years.

his conviction vacated or, alternatively, to have his sentence and the presentence investigation corrected. United States Magistrate Floyd E. Boline recommended denial of all requests for relief with the exception of one issue on which he made no recommendation. The matter is now before the court on Larson's objections to the Report and Recommendation and the government's response to them.

Petitioner's §2255 submission consisted of six separate motions seeking various forms relief. First, Larson asserted that his conviction was unlawful because it was based on illegally seized evidence. He then asserted that his conviction cannot stand because he was denied effective assistance of counsel by two attorneys. His third request was for a new trial "with counsel of his choice." Fourth, he sought resentencing on a variety of grounds: Fed. R. Civ. P. [sic] 32 (c)(3)(D), 48 [sic] U.S.C. §4205 (b)(2), the rever-

sal of his codefendant's conviction, and possible reliance in sentencing on two prior convictions that should have been expunged from the record. Fifth, he claimed that the court relied on erroneous information about parole guidelines and therefore should reduce his sentence. Finally, he argued that his aiding and abetting conviction should be vacated because his codefendant's conviction was reversed. Magistrate Boline considered each of these arguments, but found none persuasive.

Larson obviously reviewed the Report and Recommendation carefully and submitted objections to the magistrate's findings and recommendations on all or part of the first, second and fourth of his original claims. He explicitly did not object to the magistrate's rejection of the other three claims. Pursuant to Fed. R. Civ. P. 72(b), the court has made a de novo determination of those matters to which objections were filed. In

making its de novo determination, the court has carefully studied petitioner's objections and his exhibits, as well as the entire record, including the thorough Report and Recommendation and the trial transcript. After de novo review, the court finds itself in basic agreement with the magistrate on most issues. The court was obviously aided in review and consideration of the record by having presided at trial and the sentencing hearing.

Request for Evidentiary Hearing

Petitioner seeks an evidentiary hearing and Magistrate Boline found as a preliminary matter that there was no need for such a hearing. Section 2255 requires such a hearing "[u]nless the motion and the files and records of the case show conclusively that the prisoner is entitled to no relief." 28 U.S.C. §2255. "[T]he decision as to whether a hearing is necessary to determine factual contentions is committed to the discretion

of the district court." Widgery v. United States, 796 F. 2d 223, 224 (8th Cir. 1986).

The magistrate found the files and records an entirely adequate basis for determining the merits of all but one of Larson's claims. Larson now concedes that most of his claims can be resolved without a hearing. The "possible exception" identified by the magistrate, and emphasized by Larson, relates to his claim that certain advice of attorney Oscar Goodman amounted to ineffective assistance of counsel.

- 3 -

In support of his objections, petitioner has filed his own affidavit, as well as one by his wife. They state Goodman confirmed in a June, 1986 telephone call that he had advised petitioner not to participate at trial if the court didn't grant a continuance because a new trial would result, at which Goodman would represent him. 2/

2/ His affidavit also states he spent $250,000

Larson seeks an evidentiary hearing to bring this out. Such a hearing is not necessary, however, because for purposes of this petition, the court will take as true Larson's account of the advice given by Attorney Goodman.

Fourth Amendment Claims

The three pounds of cocaine at issue in this case were seized in a search of a motel room. This search was described at trial and on appeal. 760 F. 2d at 852. Larson's codefendant rented the room for a single night, paying in advance. She checked out the following morning, after obtaining permission for Larson to stay until 2:00 P.M., two hours past the usual check out time. Larson did not leave by 2:00 P.M. and subsequently told a maid that he intended to stay an additional night. He did not pay for the second night, however. At about

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2/ continued
in his defense: $30,000 to Jay Kelley, $50,000 to Goodman, and the remainder to Raymond Smith.

5:30 p.m., fearing that Larson would leave without paying for certain telephone calls, a hotel manager sent a bellman to check out the room. Informed that no one was present, the manager entered the room, where he found personal effects, empty liquor bottles,

prescription pills, and grocery bags containing plastic bags of white powder. He informed the general manager, who called the police. After police arrived at the motel and knocked on the room door, Larson responded and refused to permit them to enter the room. The motel manager consented to the search, but no warrant was obtained.

In his objections, Larson concentrates his fourth amendment argument on the warrantless search of the grocery bags found in the motel room, which he describes as closed containers.[3/]

3/ The trial testimony revealed that when the hotel manager looked into the grocery bags, he saw plastic bags inside, filled

Magistrate Boline, relying on Stone v. Powell, 428 U. S. 465 (1976), concluded that Larson was not entitled to raise fourth amendment claims because he had already had a "full and fair opportunity" to present them at a number of stages of the proceedings: in his pretrial suppression motion before Magistrate J. Earl Cudd and on de novo review to the district court, at trial, in a motion for a new trial, on appeal, and in his petition to the Supreme Court for a writ of certiorari. To the extent that Larson and counsel failed specifically to raise the container issue, the Magistrate found that it had been waived under Fed. R. Civ. [sic] P. 12(b)(3) and (f).

Larson argues that the magistrate overestimates the scope of Stone v. Powell and

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3/ continued
with white powder. Not all of the plastic bags were in manila envelopes, and the tops of some of the grocery bags were open. Pretrial transcript (P.T.) (Vol. I: 62-3, 134. Trial Transcript (T.T.) II: 307-8, 312, 336, 351, 373.

that he did not waive his container search

argument. He states [p]ermission to raise the container issue mid-trial would most likely have been denied, (Objections, at 16) and at trial "it was already too late to raise the container issue." (Objections at 21). The record contradicts this. The court told petitioner at trial he had the right to challenge the government's evidence and warned he was in danger of giving up that very important right. T.T. I: 220-21; II: 394. He was told the jury would decide his fate based "on the evidence that I allow in and on the instructions that I'm going to give at the end of the case." T.T. I: 221. Larson admitted he understood this.[4/] And Smith continued to raise suppression issues at trial. T.T. II: 299; III: 528.

4/ The Court: "You have the right to object to any evidence that comes in by any form. You have the right to request limiting instructions from the court. You have the right to seek to suppress evidence during the course of the trial..... You understand that... don't you?"

The objections suggest that the focus of Larson's argument is not so much the fourth amendment per se. Rather, he stresses that counsel's failure to raise the container argument is proof of ineffective assistance. His ineffective assistance argument will be considered separately.

The court finds itself in basic agreement with Magistrate Boline's findings and conclusions with respect to the full and fair opportunity petitioner had to litigate fourth amendment

claims and his waiver of the right to raise them. Larson is not entitled to mount a collateral attack here on the search and seizure of the bags. Nor is he entitled to a new trial or the suppression of the evidence. Even if the court were to reach the merits

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4/ continued
Larson: "Yes, I do, Your Honor."

T.T. III; 442

of the container issue, the record indicates at least some of the cocaine was in plaint view rather than in closed and opaque containers. See supra note 3.

Ineffective Assistance of Counsel

Several attorneys appeared on Larson's behalf during the pre-trial stages of the case including Jay Kelley of Minneapolis, Minnesota, Raymond Smith of Chicago, Illinois and Oscar Goodman, of Las Vegas, Nevada.

On January 30, 1984, two days before trial, Larson moved for a continuance. Larson explained that he had hired three sets of attorneys - one to conduct the trial, one to handle pre-trial motions, and one to serve as local counsel. Although he had not previously informed the court of this arrangement, he argued that only Goodman could present the case at trial and that he was engaged in another trial which would last approximately on week. The motion for a continuance was denied because Larson had

had adequate time for trial preparation and adequate notice of the trial date. Larson renewed his motion on February 1, 1984, the trial date. The motion was again denied. The court cited the previous grounds for denial and noted the case was not particularly complex, it was increasingly unclear when Goodman would

even be available for trial, and Smith was familiar with the facts of the case.

The court also denied a motion to withdraw appearances by Larson's other counsel and required Smith to act as standby counsel. The court advised Larson of the perils of proceeding without counsel, not participating in the trial, and not permitting his attorneys to do so.[5/] Nevertheless, Larson

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5/ Some examples are illustrative. The Court: "I hope you'll listen to me carefully right now, because I think that the posture that you're proceeding under right now is not in your best interests, and let me explain why ... So the consequences for you of the trial could be very great."

refused to

5/ continued
T.T.I: 59-60

The Court:"You'd be much better off-if you had your lawyer representing you here... I advise you that in my judgment it would be a foolish step for you to take."
T.T. I: 63.

The Court: "Think about it very carefully."
Larson: "I'll do that."
The Court: "Under any way you look at it, you'd be better off..."
T.T.I: 64.

The court told Larson he was foolish not to be represented by the able counsel available at trial and that constitutional rights can be waived or given up. T.T. I: 116; 218-19.

The Court: "I want you again to talk with the lawyers who have appeared in this case, your standby counsel here, and with Mr. Goodman. It's going to be up to you, but if you choose to go forward in this way, you are giving up very important constitutional rights."

Larson: "I understand that. I appreciate your concern. Mr. Smith is concerned as well, and I've got a certain amount of concern myself. I've got this

afternoon to talk with him and think about it and make that decision. As of yet, I haven't made a decision."

T.T. II: 222

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permit counsel to participate in the trial and chose essentially to stand mute.

Larson now argues that he is entitled to a new trial because two lawyers denied him adequate assistance of counsel. Larson's argument as to attorney Goodman rests on his advice that a continuance would be granted or a new trial would be ordered on appeal. Larson asserts that he believed the "prominent" Goodman and therefore relied on his incorrect advice. Larson's argument as to attorney Smith largely rests on his failure to raise the container search issue in the trial court.

Magistrate Boline refrained from making

5/ continued
The Court: I must inform you that you are giving up significant constitutional rights of representing yourself or, more importantly, in my judgment, of being represented by capable counsel that's familiar with this case." T.T. II: 230

Larson was told he could change his mind at any time. He stated that he "appreciate[d] [the court's] genuine concern" and would let the court know. T.T. I: 231

a finding relating to Goodman's alleged advice or whether it was outside the "range of professionally competent assistance." Strickland v. Washington, 466 U. S. 668, 690 (1984). It is unnecessary to reach the issue of professional competence if petitioner has not demonstrated prejudice however. Strickland, 466 U. S. at 695-96;

United States v. Reed, 756 F. 2d 654, 656 (8th Cir.), cert denied, 106 S. Ct. 111 (1985). For purposes of this motion, the court assumes Goodman gave the advice petitioner claims, but finds that the record shows that petitioner was not prejudiced by such advice.

It was clear at trial that petitioner was making his own decisions after conferring by phone with Goodman and in person with Smith, his standby counsel. See, e.g., T.T. I: 63, 222; II: 229, 231. This court gave repeated and detailed instructions to him

personally at various steps of the trial. T.I. I: 58-64, 116, 216-22; II: 230-31; III: 442, 548. The court advised him he had no constitutional right to a particular attorney and that he would lose specific rights and opportunities by persisting in his policy of not participating in the trial. Petitioner weighed the various advice he received and made his voluntary decision to proceed in the way he did. He chose not to heed the court's specific warnings. Clearly he is dissatisfied with the outcome, but he has not shown that it was caused by ineffective assistance of counsel.

As the magistrate said, the evidence against petitioner was overwhelming. He was "caught 'red handed' with about three pounds of pure cocaine." Report and Recommendation at 19. Other indicia of the drug trade were also found in his room, such as scales, a cutting agent, and packaging equipment. Petitioner stated at trial that Smith was

his suppression expert, so

Goodman's advice was not considered critical by him for search and seizure issues. It was petitioner who ordered Smith not to represent him at trial even though Smith was there and in fact continued to act to suppress evidence. T.T. II: 299, 528. The court also told petitioner that he could object to the introduction of any evidence. T.T. I: 220-21; II: 394; III: 442. He stated that he understood that. T.T. III: 442. In short, any advice from Goodman, even if ineffective, or his failure to appear at trial was not prejudicial under all the circumstances.

Petitioner also claims that Smith's failure to raise the issue of the warrantless search of the containers in the motel room amounted to ineffective assistance of counsel. In his affidavit, he states that he informed the defense team that the cocaine

seized "was enclosed in paper bags and also in manila envelopes or smaller paper bags inside the larger bag" and that the defense team had access to photographs of the evidence in the motel room.

The testimony at trial was that not all the cocaine was contained in opaque packaging and that at least some of the cocaine was visible to the hotel manager when he looked around the room. See supra note 3. As already referenced, petitioner chose not to participate with his attorney at trial in the attempt to suppress the evidence. Smith showed himself to be an able attorney in this case, and defense counsel in fact succeeded in suppressing additional amounts of cocaine and in getting a

second count dismissed. His performance certainly was within the range of reasonable professional conduct. Petitioner has mischaracterized what happened at trial in his

attempt to show ineffective assistance, but the record refutes this claim.

Motion for Resentencing

Petitioner advances several bases for his request for resentencing: (1) asserted failure to comply with Fed. R. Civ. [sic] P. 32(c)(3)(D) and possible reliance on two prior convictions that should have been expunged from his record; (2) the asserted applicability of 48 [sic] U.S.C. §4205(b)(2); and (3) the reversal of his codefendant's conviction. In his Objections, Larson indicates no objection to the magistrate's findings that the second and third of these arguments must fail.

Under Rule 32(c)(3)(D), where the defendant or counsel

> Allege[s] any factual inaccuracy in the preseentence investigation report ....the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Petitioner now concedes that the court did order expungment of a prior conviction for possession of methamphetamines, but he argues that the reference to a conviction for driving under the influence and open bottle should also have been expunged due to an uncounselled guilty plea. He also alleges error in failing to make specific findings about allegedly incorrect financial information and in failing to exclude portions of the presentence report (PSI) allegedly based on grand jury materials.

- 12 -

Prior to sentencing on May 2, 1984,[6/] petitioner submitted two sets of written objections to the PSI. One was written by attorney Kelley and also signed by petitioner; the other was written by Larson himself. These documents complained about other ref-

6/ Petitioner was permitted to remain free on bond pending determination of his appeal so he did not begin to serve his sentence until October 2, 1985.

erences to two prior convictions, automobile and house searches, informant statements, and details relating to the motel where the evidence was found. As the magistrate noted, petitioner essentially "objected to the nature of the information" rather than to any potential factual inaccuracies. Report and Recommendation at 25-26.

At the sentencing hearing, petitioner and attorney Smith said they had no further objections. Sentencing Transcript (S.T.) 3-4. Defense counsel recognized that the court had ruled on the objections. S.T. 3. The court noted all the objections and ordered that the PSI be altered to reflect that the conviction for possession of amphetamines had been expunged. S.T. 31. Other objections were overruled because the type of information challenged had been "generally accepted as appropriate for a presentence report." Id. The court state to petitioner that

"the evidence associated with this trial shows that you have been a major drug dealer." S.T. 31 (empahsis added).[7/]

As indicated at sentencing, the sentence was based on the evidence introduced at trial. The court did not take into consideration in sentencing the challenged financial data, any prior conviction, statements from informants, or results of automobile or house searches. In regard to the events at the motel, the court relied on the trial evidence.

Under Fed. R. Crim. P. 32(c)(3)(D), the trial court should have made clearer findings and determinations at the sentencing hearing and appended them to the PSI, together with copies of petitioner's objections. Written determinations, together with

7/ Petitioner apparently believes that the court's characterization of him as a "major drug dealer" was based on financial data in the PSI. In fact, it was based on the substantial quantity of nearly pure cocaine seized from the motel room, as well as other indicia of drug distribution found there.

the objections will be attached to the PSI and forwarded to the appropriate places. To this extent, petitioner is entitled to relief. He is not entitled to be resentenced, however. United States v. Weber, 818 F. 2d 14 (8th Cir. 1987). The record as a whole makes clear that no disputed matter affecting the sentence "remained unaired or unresolved at the hearing." Id. at 15.

Petitioner continues to object to financial data found in the PSI on the grounds that it represents unwarranted use of grand jury materials. He relies on United States v. Hogan, 489 F. Supp. 1035 (W.D. Wash. 1980), which held that probation

officers were not entitled to automatic disclosure of grand jury testimony under Fed. R. Crim. P. 6(e)(3)(A)(ii). The instant case is not like Hogan. The Hogan PSI contained material clearly obtained from grand jury records. Here the source of the material

was the United States Attorney's office and the Internal Revenue Service. "There is no question that the probation officer ... is entitled to interview government agents and prepare a report that includes the substance of the interviews and the probation officer's personal conclusions." 489 F. Supp. at 1039. It appears that the probation officer in this case did just that. As indicated at the time of sentencing, this objection should be overruled.

Conclusion

After carefully reviewing the record and petitioner's requests for relief, the court concludes that he is not entitled to the relief he seeks and that his motions should be denied and his petition dismissed. Copies of his objections at sentending and the court's findings and determinations should be attached to his PSI, however, and this will be addressed in a separate order to be issued today.

Accordingly, based upon the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that petitioner's motions for relief under 28 U.S.C. §2255 are denied, and his petition is dismissed.

Dated: July 2, 1987. /s/ Diana E. Murphy
Diana E. Murphy
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil 4-86-483
Criminal 4-83-84(1)

Duane W. Larson,
Petitioner,

REPORT AND
RECOMMENDATION

vs.

United States of America,
Respondent.

Duane W. Larson, #01786-041, FCI, P. O. Box 1000A, Sandstone, Minnesota 55072, pro se.

Richard E. Vosepka, Assistant United States Attorney, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401, for respondent.

Before the Court are various motions brought by petitioner, Duane W. Larson, under 28 U.S.C. Section 2255. This matter has been referred to the undersigned United States Magistrate for Report and Recommendation in accordance with 28 U.S.C. Section 636 and Local Rule 16.

REPORT

Duane W. Larson (hereinafter Larson)

was tried in United States District Court for the District of Minnesota on a one-count indictment charging him with possession with intent distribute cocaine, 21 U.S.C. Section 841(a)(1), and aiding and abetting, 18 U.S.C. Section 2. After a jury trial before District Judge Diana E. Murphy, Larson was convicted and sentenced to imprisonment for ten years.

- 1 -

The judgment of conviction was affirmed on appeal to the Eighth Circuit. United States v. Larson, 760 F. 2d 852 (8th Cir.), cert denied, 106 S. Ct. 143 (1985).

On August 1, 1985, Larson was convicted in the District of Minnesota on two counts of concealment of multiple currency transactions, 18 U.S.C. Section 1001. These two convictions were reversed on appeal. United States v. Larson, 796 F. 2d 244 (8th Cir. 1986). Larson also pleaded guilty to one count of tax evasion, 26 U.S.C. Section 7201.

He received a sentence of five years, to be served consecutively to the ten year sentence imposed by Judge Murphy. Larson is now serving an aggregated sentence of fiteen years at the Federal Correctional Institution in Sandstone, Minnesota.

Larson's Section 2255 motion is 75 pages long, and includes claims that evidence admitted against him at trial was obtained in violation of the fourth amendment. Second, Larson contends he was denied effective assistance of counsel in his representation by Attorneys Oscar Goodman and Raymond Smith. Third, Larson argues he is entitled to a new trial with "counsel of his choice." Fourth, Larson contends he should be resentenced because Judge Murphy failed to make findings as required by F. R. Crim. P. 32(c)(3)(D); he is entitled to a sentence under 18 U.S.C. Section 4205(b)(2); he was improperly sentenced for aiding and abetting; and Judge Murphy should not have considered his two

prior convictions. Fifth, Larson

requests reconsideration of his previous motion for modification of his sentence under Rule 35. Sixth, Larson argues that his aiding and abetting conviction should be vacated because his codefendant's convictions were reversed on appeal.

As a preliminary matter, the undersigned must determine whether Larson is entitled to an evidentiary hearing. Section 2255 requires such a hearing "[u]nless the motion and the files and records of the case show conclusively that the prisoner is entitled to no relief..." 28 U.S.C. Section 2255. The decision as to whether an evidentiary hearing is necessary to determine factual contentions is committed to the discretion of the district court. See Widgery v. United States, 796 F. 2d 224 (8th Cir. 1986).

The facts in this case have been developed through a pretrial evidentiary hearing,

a jury trial, and an appeal. The undersigned has reviewed Larson's motions and the extensive record generated by these proceedings, including a lengthy trial transcript. Larson himself relies almost exclusievely on the existing record. The undersigned finds that, with the possible exception of certain alleged conversations between Larson and Attorney Oscar Goodman, the files and records do provide an adequate basis for determination of this Section 2255 motion. The undersigned therefore concludes that no evidentiary hearing is required, and none will be held, at this time.

- 3 -

Rather than belabor the facts of this case, which are both familiar to the Court and contained in the published opinion in Larson, supra, the undersigned will proceed to address the issues presented. Particular facts relevant to the legal issues will be included as appropriate.

I

MOTION TO SUPPRESS

Larson first contends that evidence seized from his motel room and admitted against him at trial was obtained in violation of the fourth amendment. Larson's pretrial motion to suppress this same evidence on fourth amendment grounds was denied, and the denial of that motion upheld on appeal. See Larson, supra, at 854-56. Larson now presents a "container search" argument for suppression of the evidence and contends that claim is cognizable in this Section 2255 proceeding. Larson wants this Court to vacate his conviction, suppress the evidence, and grant him a new trial.

Collateral Review of Fourth Amendment Claims

In Kaufman v. United States, 394 U. S. 217, 231 (1968), the Supreme Court held that a federal prisoner may mount a collateral attack under Section 2255 where evidence obtained in an illegal search and seizure was

admitted against him at trial. See also Johnson v. Petrovsky, 626 F. 2d 72, 73 (8th Cir. 1980) (holding only that voluntary guilty plea barred fourth amendment claim). The Kaufman majority rejected the rule, consist-

ently followed by a majority of the Courts of Appeals, that such claims could only be presented on appeal. Kaufman, supra, at 219-21, n. 3-4; see Stone v. Powell, 428 U. S. 465, 479 n. 12 (1976). The majority opinion in Kaufman reviewed the historical scope of habeas corpus and Section 2255, and observed that "the federal habeas corpus remedy extends to state prisoners allegeing that unconstitutionally obtained evidence was admitted against them at trial." Kaufman, supra, at 225. The majority found no substantial differences between state and federal prisoners, and rejected the government's argument that collateral remedies for federal prisoners should be more

limited. Id. at 225-28. However, the majority also recognized that "where the trial or appellate court has had a 'say' on a federal prisoner's claim, it may be open to the Section 2255 court to determine than on the basis of the motion, files and records, 'the prisoner is entitled to no relief.'" Id. at 227 n. 8 (citing Thornton v. United States, 368 F. 2d 822, 833 (D.C. Cir. 1966) (dissenting opinion of Wright, J.)

The Kaufman decision stood unassailed for eight years, until the landmark case of Stone v. Powell, 428 U. S. 465 (1976), in which the Supreme Court held that:

> where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

428 U. S. at 482. The Stone v. Powell majority focused on the

primary justification for the exclusionary

rule: "the deterrence of police conduct that violates Fourth Amendment rights." Id. at 486. The court characterized Kaufman as "premised on the view that implementation of the Fourth Amendment also requires the consideration of search and seizure claims upon collateral review of state convictions" and found this view "unjustified." Id. at 481, 486; see Roach v. Parratt, 541 F. 2d 772, 773 (8th Cir. 1976).

After balancing the utility of the exclusionary rule against the costs of extending it to collateral review of fourth amendment claims, the Stone majority concluded that "the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial costs of its application of the rule persist with special force." Id. at 495. The court noted that "in the case of a typyical Fourth Amendment claim, asserted on collateral attack, a convicted defendant

is normally asking society to redetermine an issue that has no bearing on the basic justice of his incarceration." Id. at 492 n. 31. Finally, the court also noted the effect of its holding on the earlier decision in Kaufman:

> The issue in Kaufman was the scope of Section 2255. Our decision today rejects the dictum in Kaufman concerning the applicability of the exclusionary rule in federal habeas corpus review of state court decisions pursuant to Section 2254. To the extent the application of the exclusionary rule in Kaufman did not rely upon the supervisory role of this Court over the lower federal courts, cf. Elkins v. United States, 364 U. S. 206 (1960), see infra, at 484,

> the rationale for its application in that context is also rejected.

Since Stone v. Powell the Supreme Court has not specifically addressed the scope of collateral review of fourth amendment claims by federal prisoners under Section 2255. However, the Ninth Circuit has interpreted Stone v. Powell as precluding such claims:

> Thus, according to Stone v. Powell, a federal court may not grant either Section 2254 or Section 2255 habeas corpus relief on the basis that evidence obtained in an unconstitutional search or seizure was introduced, respectively, at a state or federal trial where the defendant was provided an opportunity to litigate fully and fairly his fourth amendment claim before petitioning the federal court for collateral relief.

Tisnado v. United States, 547 F. 2d 452, 456 (9th Cir. 1976); see also United States v. Hearst, 638 F. 2d 1190, 1196 (9th Cir. 1980), cert denied, 451 U. S. 938 (1981). In Hearst the Ninth Circuit made the further observation that:

> If the provided opportunity has been squandered due to defense counsel's incompetence or misconduct, a convict's only option on collateral review is a sixth amendment claim based on inadequate assistance of counsel.

Hearst, supra, at 1196 (citing Canary v. Bland, 583 F. 2d 887, 890 (6th Cir. 1978).

These cases have led one noted commentator to observe that, after Stone v. Powell, the holding in Kaufman "appears to have lost its vitality." 4 W. LaFave, Search and

Seizure Section 11.7(f) (2nd ed. 1987). Another scholar has more

forcefully stated that the "full and fair opportunity" rule:

> surely must apply to a federal prisoner seeking relief under Section 2255, and it will only be in a highly unusual case in which there was not a full and fair opportunity to litigate the Fourth Amendment claim in the original trial and appeal that it will be raisable on motion.

C. Wright, Federal Practice, Section 594, p. 453 (2d ed. 1982); see also United States v. Byers, 740 F. 2d 1104, 1137 n. 90 (D.C. Cir. 1984) (concurring opinion of Robinson, C. J.).

The foregoing analysis shows a recent trend in the law away from the broad-based collateral review of fourth amendment claims espoused in Kaufman and toward the more limited scope of review set forth in Stone v. Powell. While the Supreme Court and the Eighth Circuit have not as yet applied the "full and fair opportunity" rule to a fourth

amendment claim by a federal prisoner under Section 2255, the undersigned believes that rule best accomodates the deterrent purposes behind the exclusionary rule and the goal of finality, which must be reached at some point in criminal proceedings. See Stone v. Powell, supra, at 480-89.

Moreover, to freely extend collateral review of fourth amendment claims to federal prisoners under Section 2255 and Kaufman while precluding similar claims by state prisoners under Section 2254 and Stone v. Powell, would be to sanction unequal treatment. See generally Kaufman, supra, at 228-31; see also Stone v. Powell, supra, at 519 n. 14 (dissenting opinion of Brennan, J.).

- 8 -

The undersigned is persuaded by the reasoning in Tisnado, supra, and concludes that Larson may not raise a fourth amendment claim under Section 2255 unless he was previously denied a "full and fair opportunity" to

litigate that claim.

Full and Fair Opportunity

The Eighth Circuit has discussed the "full and fair opportunity" doctrine at length in the context of petitions for federal habeas corpus relief by state prisoners:

> It is the existance of state processes allowing an opportunity for full and fair litigation of fourth amendment claims, rather than a defendant's use of those processes, that bars federal habeas corpus consideration of claims under Stone. '[I]f state procedures afford the defendant in a criminal case the opportunity to [fully and fairly] litigate whether evidence obtained in violation of the fourth amendment should be excluded... then Stone v. Powell precludes federal habeas corpus consideration of those issues whether or not the defendant avails himself of that opportunity.' The Stone bar applies despite a state court's error in deciding the merits of a defendant's fourth amendment claim. Moreover, the Stone bar applies with equal force to procedural mistakes that thwart the presentation of fourth amendment claims.

Lenza v. Wyrick, 665 F. 2d 804, 808 (8th Cir. 1981) (citations omitted); see also Brunson v. Higgins, 708 F. 2d 1353, 1360-61 (8th Cir. 1983). Federal courts have summar-

ily denied habeas corpus relief to state prisoners who received a "full and fair opportunity" to present their fourth amendment claims even where it was clear that illegally obtained evidence was admitted against them at trial. See Wolff v. Rice, 428 U. S.

465, 471-74 (1976) (decided with Stone v. Powell, supra,); Lenza, supra, at 809 n. 6; Holmberg v. Parratt, 548 F. 2d 745, 746 n. 1 (8th Cir. 1977).

In this case, Larson made a pretrial motion to suppress all items seized from his motel room by the Burnsville police. After an evidentiary hearing, United States Magistrate J. Earl Cudd recommended that the motion be denied because Larson had no reasonable expectation of privacy in the room and the police had probable cause to believe illegal narcotics were present "and that exigency required immediate action... ." D.C. Docu-

ment No. 22 at 6. Larson objected to the Magistrate's recommendation, challenged "almost every factual finding" and argued that police had no probable cause to believe the powder found in the room by motel staff was contraband. D.C. Document No. 31 at 1 and 11.

Judge Murphy made a de novo review of the record and agreed with the Magistrate's determination that Larson's motion should be denied. At trial, Larson continued to object to the admission of any of the items seized from the motel room. Transcript at 528. Larson also argued in his motion for a new trial that the evidence was erroneously admitted. D.C. Document No. 58.

Larson then appealled his conviction to the Eighth Circuit, again argued that the evidence seized in the warrantless search of the motel room should have been suppressed. See Larson, supra, 760 F. 2d at 854-56. The Court

of Appeals also found Larson had no legitimate expectation of privacy in the motel room, agreed with the Magistrate that there were exigent circumstances justifying a warrantless search, and affirmed the district court's denial of Larson's suppression motion. Id. The court cited with approval the reasoning in United States v. Parizo, 514 F. 2d 52, 54 (2nd Cir. 1975), that "[w]hen the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it." Larson, supra, at 885 (emphasis omitted). The court also noted that once the rental period has lapsed, "the manager of a motel then has the right to enter the room and may consent to search of the room and the seizure of the items there found." Id. (citing United States v. Croft, 429 F. 2d 884 (10th Cir. 1970)) (emphasis added). On October 7, 1985, the Supreme Court denied Larson's petition for writ of certiorari. United States v. Larson,

106 S. Ct. 143 (1985).

Thus, Larson had the opportunity to present his fourth amendment claim in a pretrial suppression hearing; by objection at trial; in a motion for a new trial; on appeal; and, finally, in his petition to the Supreme Court. The undersigned finds that Larson has already had a "full and fair opportunity" to present his claim that evidence used against him at trial was obtained in violation of the fourth amendment. See Lenza, supra, at 808. The undersigned therefore concludes that under the circumstances of this case,

- 11 -

Larson is barred from litigating fourth amendment claims in this collateral proceeding under Section 2255. See Stone v. Powell, supra ; Hearst, supra; Tisnado, supra.

Waiver and Deliberate Bypass

Larson takes the position in his Section 2255 motion that evidence from the motel room should have been suppressed as the fruit

of an illegal container search. Larson argues that while he had no legitimate expectation of privacy in the motel room, see Larson, supra, at 855, he retained such an interest in the paper bags containing the cocaine. He thus seeks to distinguish his present fourth amendment claim from the issue already decided adversely to him. See generally Motion at 1-46, Traverse at 2-12.

The undersigned finds that while the focus of Larson's present claim differs somewhat, he is actually advancing the same ground for relief: suppression under the exclusionary rule. See Sanders v. United States, 373 U. S. 1, 16 (1962). Moreover, Larson failed to raise the container search claim by pretrial motion, at trial, or on appeal. Larson's contention that fault lies with his counsel, Raymond Smith, is a sixth amendment issue and will be discussed below. For purposes of this analysis, Larson's

failure to make a pretrial suppression motion claiming that containers were illegally searched resulted in a waiver of that defense. F. R. Crim. P. 12(b)(3) and (f); United States v. Ostertag, 619 F. 2d 767, 771 n. 3

(8th Cir. 1980) (citing United States v. Johnson, 614 F. 2d 622 (8th Cir. 1980).

Larson states in his motion that "it became abundantly apparent that the cocaine was sealed in packages and concealed from view" during trial. See Motion at 8-12, 50. Larson's own decision to forego a defense and his instructions to Attorney Smith that he was not to participate in the trial precluded the possibility of raising the container search issue during trial, as allowed under Rules 12(f) and 41(f). Again, Larson's contention that his decision was based on erroneous advice from Attorney Goodman is a sixth amendment claim, and will be

discussed below. Larson's defensive posture (or lack thereof) prevented litigation of the container search issue at the proper time and in the proper forum: the district court. Larson adopted that posture with the knowledge of the risks it entailed, and disregarded warnings from the trial court.

The undersigned therefore concludes that Larson is not entitled to Section 2255 relief because he has "deliberately bypassed the orderly federal procedure at or before trial and by way of appeal..." Kaufman, supra, at 227, n. 8; see e.g. Indiviglio v. United States, 612 F. 2d 624 (2nd Cir. 1979), cert denied, 445 U. S. 933 (1980) (failure to raise fourth amendment claim at trial constituted waiver and precluded Section 2255 relief). Larson's motion to suppress evidence and for a new trial should be denied.

- 13 -

II

INEFFECTIVE ASSISTANCE OF COUNSEL

Larson advances two separate claims that he was denied effective assistance of counsel, as guaranteed by the sixth amendment. First, Larson contends he received incompetent advice from Attorney Oscar Goodman. Larson alleges that Goodman told him he would have grounds for a new trial if the court did not grant a continuance until Goodman could appear. Motion at 47. Specifically, Larson alleges Goodman told him: "don't defend yourself or let anybody else defend you" if the continuance was denied. Motion at 48. Larson argues that his decision not to participate in his trial was based entirely on this alleged advice from Goodman.

Secondly, Larson argues he was denied effective assistance of counsel by the conduct of Attorney Raymond Smith, who handled the pretrial motions and acted as "standby" counsel at trial. Larson alleges that Smith was incompetent because he failed to raise the container search issue addressed

above. Larson further alleges that Smith did not adequately prepare his case because he failed to interview all the employees from the motel where the evidence was seized, and did not investigate the scene. Motion at 52-53. Finally, Larson alleges that Smith failed to raise several other legal issues, any one of which would have resulted in the suppression of evidence. Motion at 54-56.

- 14 -

The Strickland Standard

In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show both that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U. S. 668, 688, 694 (1984); see also Kimmelman v. Morrison,

106 S. Ct. 2574, 2586-87 (1986).

In evaluating the reasonableness of an attorney's conduct under the first prong of Strickland, the court must:

> judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland, supra, at 690. There is a strong presumption that counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id.

Even if the court determines that counsel made unprofessional errors, the defendant must also meet the second prong of the Strickland test, and show "there is a reasonable probability that, absent the errors, the

factfinder would have

had a reasonable doubt respecting guilt." Id.at 695. The court must consider the totality of the evidence before the jury, and determine "if the decision reached would likely have been different absent the errors." Id. at 695-96. Keeping this standard in mind, the undersigned now turns to the specific claims advanced by Larson.

Alleged Advice From Attorney Goodman

Larson has made serious allegations, detailed above, concerning advice given him by Attorney Oscar Goodman. Larson made his allegations under penalty of perjury. See Rule 2(b), Rules Governing Proceedings Under Section 2255.

The government argues it is implausible that Goodman gave Larson such advice, and that if he did, he should be disbarred for "unconscionably unethical practice." Response at 5. The government also points out

that Larson represented to the court that he would not participate in his trial in the absence of Goodman because of his feeling that no other attorney was prepared to try the case. Transcript at 229-31. The trial court had previously informed Larson he had no right to a specific attorney, and that he had already preserved the continuance issue for appeal. Id. at 59-63. However, the government has not presented any evidence to directly refute Larson's allegations.

- 16 -

The First Prong: Professionally Unreasonable Error

On the present state of the record, the undersigned is reluctant to make a factual finding as to the precise nature of the advice given Larson by Attorney Goodman. To do so without any information from Goodman himself would be unfair and unwise. Such a finding is, of course, essential to application of the first prong of the Strickland

test.

However, the undersigned does not perceive an immediate need for the evidentiary hearing requested by Larson. Traverse at 13. Instead, the undersigned believes this case to be a proper candidate for expansion of the record under Rule 7 of the Rules Governing Proceedings Under Section 2255. The undersigned would have the authority under Rule 10 to order such an expansion of the record.

But this procedure need not be followed if the Court concludes from her personal knowledge or recollection that Larson's allegation is unsubstantiated. Machibroda v. United States, 368 U. S. 487, 495 (1962), or finds that he has not demonstrated prejudice under the second prong of the Strickland test. See United States v. Reed, 756 F. 2d 654, 656 (8th Cir.), cert denied, 106 S. Ct. 111 (1985).

If the Court cannot reach either

conclusion, this matter may be referred to the undersigned for drafting of appropriate interrogatories directed to Attorney Goodman, or for issuance of an Order directing Goodman to submit an affidavit addressing Larson's allegations. See Rule 7, supra.

- 17 -

The Second Prong: Prejudice

Larson argues he was denied a trial altogether because he followed Goodman's advice and presented no defense in hopes of winning a new trial on appeal, based on the denial of a continuance. The undersigned is assuming, for purposes of this analysis, that Larson was so advised by Attorney Goodman, and that such advice was professionally unreasonable. Several circumstances surrounding Larson's trial bear on a determination of whether he has shown prejudice as defined in Strickland, supra, at 695.

First, Larson's statement to the trial court regarding his decision not to partic-

ipate in his trial does not include any reference to the continuance issue:

> Your Honor, I've decided to stand on my decision. I've considered it and discussed it with Mr. Smith. It's not that I want Mr. Goodman so much; it's just that he's the only attorney that's prepared, and he's well aware of the narcotics laws. I don't believe Mr. Smith is; I'm certainly not. And I believe I'll stay with what I've decided.

Transcript at 220; see Statement of Smith, D. C. Document 41. Larson's statement supports an inference that he would have taken his "no defense" posture regardless of Attorney Goodman's advice. Larson argues that this inference is "unrealistic". Motion at 48-49. If the inference is valid, it seems questionable whether Larson has met the "but for" test in the prejudice prong of the Strickland standard.

Second, Larson's codefendant, Sheila Burgess, was

represented by counsel throughout the trial. It is true that Burgess' counsel, Michael

by Larson could have secured a favorable verdict under such circumstances.

The undersigned declines to make a finding as to whether Larson has shown prejudice, as required by Strickland, supra. Such a finding would more appropriately be made by the Court, who acted as the trial court in this case and had the opportunity to observe the witnesses and hear their testimony. The undersigned believes the Court is therefore uniquely

qualified to determine whether Larson has demonstrated a reasonable probability that the outcome of his trial would have been different.

Conduct of Attorney Smith

Larson first contends Attorney Smith should have raised the container search issue, discussed above, either in his pre-trial motion to suppress or during trial under Rules 12(f) and 41(f) of the Federal

Rules of Criminal Procedure. Larson's contention that Smith did not adequately investigate his case is also tied to the container search issue: Larson argues that had Smith questioned the motel employees or investigated the scene, he would have discovered facts which would ultimately have led to the suppression of evidence.

These claims are similar to those raised in the recent case of Kimmelman v. Morrison, supra. In Kimmelman, the Supreme Court applied the Strickland standard in the context of a collateral attack by a state prisoner under 28 U.S.C. §2254. Like Larson, the prisoner in Kimmelman alleged he was denied effective assistance of counsel because his attorney failed to raise a fourth amendment claim. In discussing the appropriate standard to be applied in such a case, the Supreme Court stated:

> As is obvious, Strickland's standard, although by no means insurmountable, is highly demanding. More importantly,

> it differs significantly from the elements of proof applicable to a straight forward Fourth Amendment claim. Although a meritorious Fourth Amendment issue is
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> - 20 -
>
> necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitoners who can prove under Strickland that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.

Id. at 2587 (emphasis added).

That attorney Smith did not raise the container search issue now pressed by Larson cannot alone be regarded as a professionally unreasonable error. See Strickland, supra, at 688; Indiviglio, supra, at 628-29, see also United States v. Meyer, 417 F. 2d 1020, 1023-24 (8th Cir. 1969). It is clear from the circumstances of the search, and from Larson's own statement of facts in his 2255 motion, that he was more intimately familiar with the location and packaging of the cocaine

and the other evidence than the other witnesses. See generally, Motion. If Attorney Smith was unaware until midway through trial that the cocaine was concealed inside sealed envelopes, his ignorance can only be attributed to Larson's failure to inform him of that fact. See Strickland, supra, at 691; compare Kimmelman, supra, (attorney's own negligence in failing to conduct any discovery whatsoever made him unaware of damaging evidence). Larson has not alleged that he ever informed Attorney Smith of these facts, which would be crucial to the viability of a suppression motion based on an illegal container search. The undersigned notes that Attorney Smith and his associates devoted some 400 hours to pretrial motions

on behalf of Larson. See D. C. Document 41. The undersigned concludes that Larson was not denied effective assistance of counsel in his pretrial representation by Attorney Smith.

Larson's claim that Smith should have requested a suppression hearing on the container search issue based on facts adduced at trial is disingenuous. Larson intructed Smith, who was instructed by the Court to act as "stand-by" counsel, not to take any part in the proceedings. Larson cannot now complaint that he was denied effective assistance of counsel because Smith followed his instructions. See Faretta v. California, 422 U. S. 806 (1975); United States v. Dickens, 695 F. 2d 765 (3rd Cir. 1982), cert denied, 460 U. S. 1092 (1983).

Larson also contends there were other legal grounds available to Attorney Smith, any of which "would have resulted in a suppression of evidence." Motion at 56. Had Smith failed to move for suppression of evidence altogether, this argument might carry some weight. See e.g. Morrison v. Kimmelman, 752 F. 2d 918 (3rd Cir. 1985), aff'd, 106 S. Ct. 2574 (1986). However,

Smith did argue for suppression on the grounds that Larson had a reasonable expectation of privacy in the motel room. See Larson, supra, at 854-56. Contrary to Larson's assertions, the undersigned finds there was substantial merit in this position, which was addressed at length by the Eighth Circuit. Id. Further, effective assistance of counsel "does not demand that every possible

motion be filed, but only those having a solid foundation." United States v. Hines, 470 F. 2d 225, 232 (3rd Cir. 1972), cert denied, 410 U. S. 968 (1973).

The undersigned therefore declines Larson's invitation to "second-guess" the strategic choices made by Attorney Smith from among possible legal arguments. See Strickland, supra, at 689. Smith's conduct was that of a reasonably competent attorney. Id. at 688.

Finally, Larson contends Smith should

have requested imposition of sentence under 18 U.S.C. Section 4205 (b)(2). As discussed below, the sentencing court was aware of sentencing alternatives under Section 4205; chose to impose sentence under Section 4205(a); and later declined to alter that sentence on Larson's motion for relief under Rule 35 of the Federal Rules of Criminal Procedure. The undersigned concludes that Larson has failed to show any prejudice from this alleged oversight on the part of Attorney Smith. See Strickland, supra, at 694.

- 23 -

III

MOTION FOR NEW TRIAL

Larson has moved for a new trial "with counsel of his choice" and contends his right to choose counsel was violated when the district court denied his motion for a continuance. Motion at 57. The undersigned agrees with the government that this issue was decided by the Eighth Circuit in Larson, supra, 760 F. 2d at 658-57 [sic]. That court found "the trial

court did not abuse its discretion, as it had more than ample justification for refusing Larson's motion for a continuance." Id. at 857. Larson may not relitigate the denial of a continuance in this Section 2255 proceeding. See House, supra, at 515 and n. 27; see also United States v. Little, 608 F. 2d 296, 299-300 (8th Cir. 1979), cert denied, 444 U. S. 1089 (1980).

IV

MOTION FOR RESENTENCING

Larson makes several arguments in support of his motion for resentencing. He contends that: (1) the sentencing court failed to make findings of fact regarding his objections to the presentence investigation report (PSI), as required by F. R. Crim. P. 32(c)(3)(D); (2) he is entitled to a sentence under 18 U.S.C. 4205(b)(2); (3) he was improperly sentenced for the crime of aiding and abetting; and (4) the sentencing court should not have considered two prior

convictions in imposing sentence. See Motion at 61-66. The undersigned finds no merit in any of these contentions.

- 24 -

Findings of Fact Under Rule 32

Rule 32 provides for disclosure of the PSI to a defendant and his counsel before imposition of sentence. F. R. Crim. P. 32(c)(3)(A). The court must afford a defendant the opportunity to comment on the PSI "and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it." Id. Rule 32 also prescribes the procedure to be used by the court in resolving any allegation of factual inaccuracy:

> If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence report or the summary of the report or a part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

> A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made avaiiable to the Bureau of Prisons or the Parole Commission.

Id. at 32 (c)(3)(D) (ephasis added).

Larson states he has objected to the PSI on numerous occassions and he knows "there are many statements in the PSI that are not true." Motion at 64; Traverse at 22. However, Larson has not made any specific allegations in his Section 2255 motion of factual inaccuracies in the PSI, or offered any evidence to controvert any particular portion of the PSI. Moreover, Judge Murphy's comments at sentencing indicate that Larson's objections to the PSI at sentencing did not allege any

factual inaccuracy, and that he only objected to the nature of the information:

> I note the objections, but I overrule them because the type of information that's complained about is the type that has generally been accepted as appropriate for a presentence invest-

igation report.

Transcript of Sentencing at 31. It is axiomatic that where no factual inaccuracies are raised, no written findings or determinations required. F. R. Crim. P. 32(c)(3)(D).

The undersigned concludes that the sentencing court complied with Rule 32 and Larson is not entitled to resentencing on that basis. The district court will have the opportunity, upon submission of this Report and Recommendation, to make its own findings as to whether Larson alleged any factual inaccuracies in the PSI.

Request for Sentence Under Section 4205(b)(2)

The court has twice declined to grant Larson the advantage of a sentence imposed under 18 U.S.C. Section 4205(b)(2): once at his original sentencing, and the second time by denial of his Rule 35 motion. Thus, Larson will not be eligible for parole until he has served one-third of his sentence. 18 U.S.C. Section 4205(a); United States v. Pry,

625 F. 2d 689, 692 (5th Cir. 1980), cert denied, 450 U. S. 925 (1981). The decision whether to designate a prisoner as eligible for parole under Section 4205(a), (b)(1), or (b)(2) is a matter committed to the discretion of the sentencing court. See 18 U.S.C. Section 4205. Larson has not demonstrated any abuse of that discretion.

- 26 -

Aiding and Abetting

Larson contends he was improperly sentenced for both possession with intent to distribute cocaine, 21 U.S.C. Section 841 (a)(1), and aiding and abetting, 18 U.S.C. Section 2. This claim is related to his contention, discussed below, that his conviction for aiding and abetting should be vacated.

Larson is correct that the Judgment and Commitment Order, Motion Exhibit 32-10, does not state that his ten year sentence was imposed only for his drug conviction. However, this fact does not support Larson's conclusion

that he was sentenced for aiding and abetting.

The statute in question, 18 U.S.C. Section 2, "does not define a crime but merely makes punishable as a principal one who aids and abets another in the commission of a substantive crime." Powers v. United States, 470 F. 2d 991 (5th Cir. 1972). Accordingly, the aiding and abetting statute itself does not include any penalty provision. See 18 U.S.C. Section 2. The undersigned concludes that Larson, who was convicted for the substantive offense of possession of cocaine as charged in a one-count indictment, was actually sentenced for that substantive offense.

Use of Two Prior Convictions

According to the record, the parties agreed at sentencing that one of Larson's two prior convictions had been expunged. Transcript of Sentencing at 3-4. The sentencing court also ordered that the PSI "be altered to reflect the fact that this

one conviction was expunged...." Id. at 31. The record therefore refutes Larson's claim that the sentencing court improperly considered the expunged conviction in imposing sentence upon him.

Larson also argues that the sentencing court should not have considered his 1969 conviction for DWI and open bottle, and claims he was not represented by an attorney in that proceeding. Larson has apparently filed an action in Martin County, Minnesota, seeking to have this second conviction expunged. See Motion Exhibit 32-69.

The real focus of Larson's motion seems to be directed at the effect his prior conviction will have on his salient factor score and eventual release on parole. See 28 C.R.R. Section 2.20 (Salient Factor Score Manual). This is a matter for Larson to take up with the Parole Commission at his initial hearing. However, the court may wish to clarify the record as to the effect, if any,

that Larson's prior 1969 DWI conviction had upon his sentence.

V

MOTION FOR RECONSIDERATION OF RULE 35 MOTION

Larson asks the court to reconsider its Order of February 11, 1986, which denied his motion to modify his sentence in accordance with 18 U.S.C. Section 4205(b)(2). Larson now alleges the court was misinformed as to the effect his sentence structure would have on his eligibility for parole. Larson argues that under United States v. Solly, 559 F. 2d 230

(3rd Cir. 1977), the court still has jurisdiction to modify his sentence under F. R. Crim. P. 35(b). For several reasons, the undersigned concludes that this motion should be denied.

First, Larson's motion for relief under Rule 35 is untimely. On October 7, 1985, the Supreme Court declined to review the

Eighth Circuit's decision affirming Larson's convictions. See Larson, supra, 106 S. Ct. at 44. Any motion for reduction of sentence under Rule 35 had to be filed within 120 days of that date. F. R. Crim. P. 35(b). Larson filed his Section 2255 motion on June 10, 1986, which clearly exceeds the 120 day period. This court therefore lacks jurisdiction to consider relief under Rule 35.

The fact that Larson previously filed a timely Rule 35 motion only supports the second ground for denying his present motion: finality. In her Order denying Larson's previous Rule 35 motion, Judge Murphy concluded that "the sentence originally imposed was proper under all the circumstances." Order of February 11, 1986. Larson did not appeal that Order to the Eighth Circuit. Compare Solly, supra, at 231 (appeal taken from denial of timely Rule 35 motion). Larson may not avoid the effect of the prior Order, which is now final, by styling his present Rule 35

motion as one for "reconsideration" under Section 2255.

Lastly, the record does not substantiate Larson's allegation that Judge Murphy denied his Rule 35 motion based on misinformation as to the amount of time he would serve before

being paroled. Larson refers to an "interview" between his wife and Judge Murphy, but has not filed an affidavit concerning the substance of the alleged conversation. Motion at 67-68. Nor do Judge Murphy's comments at sentencing indicate any confusion about Larson's eligibility for parole. On this record, the undersigned cannot find that an experienced judicial officer such as Judge Murphy was unaware of the difference between a sentence imposed under 18 US.C. Section 4205(a) and 4205(b)(2). See Edwards v. United States, 574 F. 2d 937, 941 (8th Cir.), cert dismissed, 439 U. S. 1040 (1978). Thus,

the undersigned cannot conclude that Judge Murphy made a critical error or that her expectations regarding Larson's sentence have been frustrated. See generally Edwards at 942-45 (discussing so called Kortness doctrine, established in Kortness v. United States, 514 F. 2d 167 (8th Cir. 1975)).

VI

MOTION TO VACATE AIDING AND ABETTING CONVICTION

Larson contends his conviction for aiding and abetting should be vacated because his codefendant's convictions were reversed on appeal. See Larson, supra, 760 F. 2d at 857-58. The Eighth Circuit determined that there was insufficient evidence for the jury to have concluded beyond a reasonable doubt that the codefendant, Sheila Burgess, knew of the existance of the cocaine seized from the motel room or intended to aid and abet Larson's drug scheme. Id. at 858. Larson argues that since the government did not prove

Burgess committed any crimes, his

conviction for aiding and abetting cannot stand.

Larson's motion is essentially directed at the sufficiency of the evidence and therefore may not properly be brought in this Section 2255 proceeding. See Houser, supra, 508 F. 2d at 516 and n. 42. Larson offers no explanation for his failure to challenge the sufficiency of the evidence to support his aiding and abetting conviction on direct appeal. See Larson, supra.

Even if this issue were properly before the court, Larson would not be entitled to vacation of his aiding and abetting conviction. First, the conviction of another person is not an element of the offense of aiding and abetting. See 18 U.S.C. Section 2. As the Supreme Court stated in Standefer v. United States, 447 U. S. 10, 20 (1980):

all participants in conduct violating

> a federal criminal statute are "principals." As such, they are punishable for their ciminal conduct; the fate of other participants is irrelevant.

In Standefer the court upheld a defendant's conviction for aiding and abetting even though the alleged principal was acquitted of the substantive offense. Id. at 13-14.

Nor do the cases cited by Larson compel the conclusion that his conviction for aiding and abetting must be vacated because the government did not prove its case against Burgess. See United States v. Walden, 464 F. 2d 1015 (4th Cir.) cert denied, 409 U. S. 867 (1972) (discussing proper venue); White v. United States, 366 F. 2d 474 (10th Cir. 1966) (upholding conviction); Morgan v. United States, 159 F. 2d 85 (10th Cir. 1947) (reversing conviction for aiding and abetting where indictment failed to

name any other person as principal).

Finally, vacating Larson's aiding and abetting conviction would not affect his

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5307MN

Duane W. Larson, *
*
Appellant, *
*
vs. *
*
United States of America, *
*
Appellee, *
*

Appeal from the United States District Court for the District of Minnesota-Civ. 4-86-483

This appeal from the United States District Court was submitted on the record of the said District Court and the briefs of the parties.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the District Court is affirmed in accordance with the opinion of this Court.

February 5, 1988

A true copy.
ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5307MN

Duane W. Larson,	*	Appeal from the
	*	United States
Appellant,	*	District Court
	*	for the District
vs.	*	of Minnesota
	*	
United States of America,	*	
	*	
Appellee,	*	
	*	

Appellant's petitions for rehearing en banc have been considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

January 27, 1988.

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit

TITLE:	REPORTING OFFICER:
POSS OF CONTROLLED SUBSTANCE	C. HOLDEN
BADGE NO.	CASE FILE #	TICKET NUMBER
27	83014156	FORMAL COMPLAINT
DATE AND TIME REPORT MADE		
10/30/83 @ 1900	Page 3	

Narrative:

nature. There were several liquor and/or wine bottles on the floor. The bed was in disarray. There was used kleenex and debris around the room and also several plastic bags containing white powders scattered throughout. Some of these bags of powder were located in plain view on the bed. Some were in paper bags under the television set, on the counter area, and on the sink in the bathroom. There also was a triple beam balance scale on the bed and a sifting device which had traces of the white powder on it. It appeared to both Sgt. Schlueter and I that at least some of the white powder was a controlled substance, possibly cocaine.

I then searched Duane Larson to check for weapons and removed a bulky object from

his right front shirt pocket. This later was determined to be many sheets of note paper which was eventually returned to him. I also found a solid object in his back pocket which was found to be a wallet, which was later returned to him also. I then handcuffed him and told him that he was under arrest. He was also advised of his rights per Miranda from a card that I carry in my pocket. He advised me that he understood his rights and that he wished to speak with an attorney.

A transport car was then ordered and Officer Martens then arrived on the scene. Larson was taken out and placed in the rear of Marten's squad car and transported to the station.

After discovery of the items in room #124, we asked Webster and Peterson if they would mind leaving us alone to process the scene and we would be in contact with them later. They agreed to that and I brought my squad around to get the camera equipment. I

then took some photographs of room #124 of Howard Johnson's prior to removing the evidentiary items. Eventually, several plastic bags containing white powdery substances were removed from the motel room from various locations. See property inventory and notes regarding these items and the areas they were located in. Also taken and eventually placed into the property room were a green colored sifter in a baggie, two keys found on the night stand, a motel invoice #39749 from Howard Johnsons which had shown checkout from room #124 on this date, the 29th of October, and all other items listed on the property and inventory report.

Note also that while Larson was also still in the room, Sgt. Schlueter picked up the vest and noted a heavy object in one of the pockets. Feeling that it may be some type of a gun or other weapon, Sgt. Schlueter removed the item and found it to be a large ring of keys which appeared to be masters for

vehicles and other locks. After this, all other items taken into evidence from the room were taken and placed in the rear of my squad, unit #3, at which time I transported them to the Public Safety Building in Burnsville. Sgt. Schlueter stayed behind at Howard Johnsons and a short time later a vehicle registered to Mr. Larson was located. This was impounded and later brought to the Public Safety Building and placed in the bay pending a possible search warrant.

At approximately 2140 hours, Sgt. Schlueter and I were both back at the station and individually listed and inventoried the items we seized, at which time they were placed in the property room, locker I. Prior to our completion of this task, Sgt. Deutschman and Lt. Rau came to the station. At that time Sgt. Deutschman ran a test with our narcotics identification system test kit on a small amount of the white substance taken from a

small plastic bag, listed as item #9 on the property and inventory form. We observed the results of this test which indicated a positive for cocaine. This substance in item #9 appeared similar to what was in several of the other larger plastic bags that we had taken. We then completed the property and inventory and called the County Sheriff's Office to transport Larson to the County Jail. The property on his person had earlier been inventoried by Officer Martens and he was also photographed prior to being released to the County.

PRETRIAL TRANSCRIPTS

William A. Webster 62

Q. Were they, in fact, beer bottles?

A. No, I don't believe they were. They were liquor bottles.

Q. Did you observe any other things?

A. There was maybe --I don't know the number--a dozen or so used Kleenexes laying next to the bed on the floor and a bunch of grocery bags laying around the room.

Q. Did you look into any of these bags?

A. Yes, I did.

Q. Why did you look into those bags?

MR. NASH: Objection, again, Your Honor, as to the state of mind of the witness.

Mr. SMITH: I join in that objection.

THE COURT: The objections are overruled.

By Mr. Vospeka:

Q. Why did you look into the bags?

A. To try to determine if there was something of value in the room that would indicate that the person had not checked out or had

stayed in the room. We were trying to determine if the room was vacant or not.

Q. Alright. And you looked in the bags?

A. Yes, I looked in the bags.

Q. What did you see?

A. The first bag I looked into I found more liquor bottles. The second bag I looked into, I saw some white

powder wrapped in plastic, clear plastic bags.

Q. Any other things that you observed?

A. No, not at that time.

Q. Now, you observed some white powder. Did that cause you any concern at that time?

A. Yes, it did.

MR. NASH: Objection, Your Honor, to the form of the question, for the same reasons previously stated when Mr. Vosepka asked why.

MR. SMITH: I join in the objection as to his concern, Your Honor, why he was concerned.

THE COURT: The objections are overruled.

He may answer.

By Mr. Vosepka:

Q. Did that cause you any concern?

A. Yes, it did.

Q. What were your thoughts at the time that you saw that?

A. Well, I thought it was something illegal. I wouldn't recognize illegal narcotics if I saw them, but I knew it wasn't sugar and I knew it wasn't flour.

Q. All right. And so what did you do?

A. So I went back to the front desk. I informed Pam what I found, and I went to the restaurant and had the assistant restaurant manager who was on duty that night come

time. (To witness) Don't answer quite so fast so that they can state an objection if they have one.

THE WITNESS: Yes, Sir.

By Mr. Vosepka:

Q. Now, from your review of the records and

also your personal experience on the scene on October 29th, do you have any indication that Duane Larson rented Room 124 or any other room in the motel for that night?

MR. SMITH: I object, Your Honor, for a conclusion.

MR. NASH: Same objection that I made with regard to the previous question.

THE COURT: He may answer.

A. The answer is no, we have no record of Duane Larson registering for a room for the 29th.

By Mr. Vosepka:

Q. Do you have any record of a Sheila Burgess or a Duane Larson paying for a room for the 29th?

A. No.

By Mr. Vosepka: I have no further questions, Your Honor.

THE COURT: Mr. Smith.

MR. SMITH: (To Mr. Vosepka) Do you have a clean copy of the police report? I marked ine all up.

MR. VOSEPKA: I've only got one, Your Honor.

A. Yes, we did.

Q. What things did you find in the room?

A. We found paper bags.

Q. When you say "paper bags", can you describe what kind of paper bags?

A. They're of the type that you would get in a supermarket.

Q. A grocery-type bag?

A. Right, brown paper bags.

Q. Were there any contents in those bags?

A. Yes, there was.

Q. What type of things?

A. Well, there were several paper bags. Several of the paper bags contained plastic bags or envelopes inside the paper bags, and there was various white powders inside of the plastic bags.

Q. Okay. And were there any other things contained in any of the paper bags?

A. One of the bags had a green, what appeared to be a sifting device, in it. There

was a bag on the bed which had a black case in it, which was later found to contain a scale.

Q. What kind of a scale?

A. A triple-beam balance scale.

Q. Would that be capable of measuring in grams?

A. Yes, sir, it was graduated in grams.

Clark Holden 135

Q. All right. And any other items?

A. There was a quantity of liquor bottles on the floor, used Kleenex. There was a blue vest, like a nylon down vest.

Q. Now, after conducting that search, did you seize various items that you found there?

A. Yes, we did.

Q. By the way, with regard to these bags, were they out in the open, or were they hidden in some way in the room?

THE COURT: Does that make much difference, Mr. Vosepka?

MR. VOSEPKA: Very well, Your Honor.

By Mr. Vosepka:

Q. Going back to the point where Mr. Peterson indicated to Mr. Larson that he felt the room was vacant, had you requested Mr. Peterson's permission to enter the room?

A. No, sir.

Q. Did you then, after you had conducted your search in the room, did you take any further action?

A. We did several things after we entered the room. At that point we gave a cursory examination to the items we discovered. At that time I placed Mr. Larson under arrest and handcuffed him. That was done just outside the room. I brought him back into the entry point of the room. Not too long thereafter, we ordered a transport car for Mr. Larson.

I attempted to serve copies of our instructions, proposed voire dire, and whatever Jencks material we had that hadn't already been provided to the defense. Mr. Smith refused to take it on the grounds that he said he wasn't acting for Mr. Larson.

Perhaps one of the things we might take up in this chambers conference--

THE COURT: I already mentioned the two motions that I know about.

MR. SMITH: In other words, I'm still here representing Mr. Larson for any pretrial motion, which I consider this to be part of, the motion to suppress and certainly that the case should be dismissed, this Count II, with prejudice.

THE COURT: And the Court hasn't granted any motion motion to withdraw, in any event.

MR. SMITH: I'm aware of that, Your Honor.

THE COURT: That clarifies the record.

The motion to dismiss Count II, then with prejudice is granted.

I don't want to take up a lot of time on detailed discussions of motions, and so on, at this point because we have jurors waiting from 1:30 on. Obviously, we have to take up a discussion of the motion to withdraw because of the nature of the motion.

Briefly, though, what is your motion to dismiss

Q. All right.

A. This chair--I can't recall where that was, but I know the table was moved over here approximately where the chair should be, and I don't remember exactly where the chair was.

Q. Did you observe anything around or on or under that table?

A. On the top of that table there were two or three shopping bags, grocery bags.

Q. Did you look into any of those grocery bags?

A. Yes.

Q. And did you observe anything in any of the grocery bags?

A. Yes. In the first bag I looked into there was empty liquor bottles, maybe two or three.

Q. Did you observe anything in any of the other bags?

A. Yes. In the second bag I looked into, there was a plastic bag of white powder in

there.

Q. Did you do anything with regard to that powder you observed?

A. No. At that time when I opened the bag, I just looked down into it. I didn't pick it up or anything.

Q. Can you describe the plastic bag?

A. Its about---it laid flat in the shopping bag, so it wasn't bigger than a shopping bag, may an inch or an

inch and a half tall, about like that.

Q. Can you characterize how much of the white powder there was in the bag in relation to the total volume?

A. Well, it was full. The bag was full of it.

Q. Did you observe anything else in that area?

A. In this area? No.

Q. Now, I'm going to ask you, understanding

that the furniture was in a little different location than it appears in this diagram, to use this green marker and indicate where the bag with that white powder was when you first walked into the room. And would you put a "W-P" for white powder? Would you put that on there?

A. Do you want me to move this table over?

Q. No, just mark where the white powder was found, and I think the jury understands that the table had been moved over.

A. It was in about this area here (Indicating).

Q. Did you observe any other things in the room?

A. Yes.

Q. What?

A. On this night stand here, there was a set of car keys. Well, I didn't know then it was car keys. There was a set of keys here.

Q. Do you recall how many keys?

A. Three or four.

Q. Would you put a mark on there with a "K" for where that was and the arrow to the nightstand?

(The witness complied.)

Q. What other things did you observe in the room?

A. Right in this area here there was a couple more liquor bottles, and there was a bunch of used Kleenex in this area.

Q. On the floor or on the bed?

A. On the floor.

Q. What was the condition of the bed?

A. The bed, it looked like somebody had slept in it. All the sheets and covers were messed up and just tossed about.

Q. Did you observe any other things in the room while you were there?

A. A box of cough drops on the bathroom counter, and that's about it.

Q. Now, you can take your seat, Mr. Webster. After you had seen this, did you do anything?

A. Yes. Then I went back up to the front desk, and I told Pam what I had found.

Q. And Pam --is that Pam Johns?

A. Pam Johns. And then I went to the restaurant and got the assistant restaurant manager who was on duty that night.

your second entry into the room?

A. No.

Q. So this W-P would still represent where the grocery bag with the white powder was?

A. Yes.

Q. Did you still observe the keys on the night stand?

A. Yes.

Q. Did you go over and pick those up or do anything with them?

A. No.

Q You've described several things like Kleenex and empty liquor bottles. Did any of those appear to have been moved?

A. No, they were in the same place.

Q. Let's go back to the bag with the white powder. What did you do with the bag with the white powder.

A. I picked it up out of the grocery bag, and I showed it to Mary Jo, and I ground it between my fingers a little bit.

Q. Did you open up the bag to do that?

A. No.

Q. So you were grinding it with the plastic-

A. Through the plastic, right.

Q. And did you form any personal conclusions as to what you were observing at that time?

A. Yes.

Q. What did you conclude?

A. Well, I knew it wasn't flour or sugar.

Q. Why?

A. The texture was different.

Q. And did you observe anything else there?

A. Well, there was more than one plastic bag in the grocery bag.

Q. You realized that when you picked the one up?

A. Yes.

Q. Can you describe the other plastic bag?

A. It was almost exactly the same.

Q. And when we're talking about plastic bags, were these clear plastic?

A. Clear plastic, right.

Q. Did it also contain a white powder?

A. Yes.

Q. Did the white powder appear to be similar to the white powder you saw in the other bag?

A. Yes.

Q. Did you pick that one up also?

A. I don' think so, no.

Q. Did you see anything else in the room?

A. No.

Q. Did you ask Mrs. Kraft to do anything?

entry by yourself?

A. Besides what I saw the first time, we noticed there was a coat in the room.

Q. Had you noticed a coat in the room when you had been there the first time?

A. No.

Q. When you say a coat, what kind of a coat?

A. It was a blue winter coat.

Q. Any other items in the room?

A. Beyond what I had seen the first time, no.

Q. Well, had you seen any other grocery sacks in the room the first two times that you had been there?

A. On, no, I didn't. I only noticed the ones that were on the table.

Q. Now, on this occassion, did you observe any other grocery sacks?

A. Yes, there were some up on the desk here by the TV.

Q. Were there any in the area of the TV?

A. Not that I recall.

Q. Were things to any extent in any different locations than when you had been in the room the first time?

A. Yes. One of these chairs--I can't recall which one, if it was the left hand or the right hand one--had been moved here in front of the TV.

William Webster 319

A. And was the bag that you had observed on the table in the area where you marked W-P, was that stil there, or had that been moved to someplace else?

A. No, this one had been moved. I believe it was up here on the desk.

Q. Did you find any other indications that items had been moved?

A. No, just the bags and the chair.

Q. And, in your presence, did the police begin to do something?

A. They began questioning the person that

was in the room. They began to search the room.

THE COURT: Mr. Nash? Counsel, do you want to approach the bench?

(At the bench.)

MR. NASH: I just wanted to indicate to the court reporter to put a paper clip there.

(In open court.)

By Mr. Vosepka:

Q. Did the police do anything with regard to the room?

A. Yes, they did. They pulled the sheets and the blanket back off the bed. They looked under the bed. I believe they looked in the bags; they looked in the bathroom. And I don't recall specifically what else they might have done.

William Webster 320

Q. Did they find some items that you saw?

A. Yes, they found another bag of white powder underneath the sheets, or under the

mattress , underneath the sheets. They found a bag somewhere in this area. (Indicating.)

Q. Now, when you say "this area", you had pointed with regard to the bag of white powder to what would be the foot of the bed towards the middle of the room.

A. Yes.

Q. Now you're pointing with regard to this other bag you're going to tell us about to the area of the head of the bed near the night stand where the "K" for keys is put, is that correct?

A. Yes.

Q. What was in the bag that was at the head of the bed?

A. There was a scale in it--I think its called a gram scale--in a black case.

Q. Had you seen that in the room previously when you had been there?

A. No.

Q. I'm going to show you what has been

marked as Government Exhibit 14 for identification and ask you if you can generally recognize that.

A. Yes.

here.

Q. When you say "this here," you're pointing to the desk area that's adjacent to the TV on the right hand wall as you're facing it?

A. Yes. There was a box in the middle here.

Q. What kind of a box?

A. Bailey's box.

Q. Bailey's--you're referring to the liquer?

A. Yes. I'm not really sure, but I know there was, like the bed was pulled apart.

Q. It wasn't made up at that point?

A. No.

Q. Now, did Mr. Webster do anything that you observed?

A. All he did was show me what was in the bag, asked me if I knew anything about coke or anything like that.

Q. You say he showed you what was in the bag. Point to the area where that bag was located.

A. It was either on the table or the chair. It was sitting in this area, though.

Q. What did he show you that was in the bag? Again, we're talking about a grocery bag?

A. Yes.

Q. What did he show you?

A. There were two bags about that big (Indicating.)

of white powder.

Q. And when you say "that big", so the court reporter can get it, can you describe it?

A. I don't know. How big would you say that is?

Q. Would you hold your hands apart? Perhaps I can describe it. Perhaps six inches wide?

A. Yes, could be.

Q. And you saw white powder in the bags?

A. Yes.

Q. Did you observe anything else in the room that you can recall?

A. Not really besides the fact that it looked like it had been a room that had been partied in.

Q. Now, what happened after he showed you the white powder in the bags? When I say "he", Mr. Webster.

A. There was just discussion on what we should do, and we kind of left.

Q. Was anyone in the room at the time that you entered?

A. No.

Q. Did you lock the door behind you?

A. They lock automatically.

Q. And did you close the door behind you?

A. Yes.

Q. Was that the extent of your involvement with

did.

A. Originally when we entered the room, I was originally pretty much confined to this area and the bathroom area.

Q. When you say "this area", your pointing to an area near the hallway door entrance and near the entrance to the bathroom?

A. Yes.

Q. And in that area, did you find any items?

A. I originally found an item in the bathroom area located on the edge of the sink in this area.

Q. What was the item?

A. The item was a grocery bag.

Q. Did you look in the grocery bag?

A. Yes, I did.

Q. And did you find anything in that grocery bag? I don't think we've described it. You've pointed to an area here. Were you pointing to an area on top of the sink in the bathroom?

A. That's correct.

Q. At the area where the grocery bag was, did you find anything in the grocery bag?

A. Yes, I did.

Q. What did you find?

A. There was three plastic bags inside that

in that grocery bag.

I'm going to show you now Government Exhibits 1, 2 and 3 for identification and ask you if you can recognize those items. And if you would, please, start with Government Exhibit 1.

A. Yes, I do recognize it. Item number 1 came from the grocery bag that was on the sink in the bathroom.

Q. And how do you recognize that envelope, the contents of that envelope which is marked Government Exhibit 1 for identification?

A. I marked the item with the case file and the date, the time, and I also wrote my

name on the bag for identification purposes.

Q. All right. Now, does your name and the case number and any of that information appear anywhere else on Government Exhibit 1?

A. Yes, it does. It appears at the top of the outside sealed bag.

Q. And you say the outside sealed bag. Is that the bag that has the marking Government Exhibit 1 for identification on it?

A. Yes, it is.

Q. So there's also items contained in that bag, one of which has your marking on it?

A. That's correct.

Clark Holden 340

Q. Tell us how that material was wrapped as you found it in the grocery bag?

A. The white material was contained inside the plastic zip lock bags that are inside of here. It was triple bagged, and the powder was in the innermost bag.

Q. And those bags, are they contained in

Government Exhibit 1 for identification, that exterior envelope that have [sic] your name on it?

A. Yes.

Q. Let's move on to Government Exhibit 2 for identification. Can you identify that?

A. Yes, I can. Item number 2 was also contained in the grocery bag on the sink in the bathroom along with items number 1 and 3.

Q. How can you identify number 2?

A. Item number 2 has also been marked by me with the case file, the date, the time and my name on the innermost bag, which was sealed.

Q. The outside bag has marked on it Government Exhibit 2 for identification. Is that the bag that you're referring to as also having your markings?

A. Yes, it is.

Q. Now, the inner portion of that outside bag, are those the contents that you found in the paper bag or part of

the contents that you found in the paper grocery sack?

A. Yes, it is.

Q. Now, tell us how Government Exhibit 2 for identification, or the contents of Government Exhibit 2 for identification, were found by you to be wrapped when you found them in the grocery bag.

A. The powder was bagged inside the zip-locked bags here as was item number 1. The bag was inside the manila envelope.

Q. So there's a manila envelope also contained in Government Exhibit 2?

A. Yes, there is.

Q. And the zip-lock bag with powder was inside that?

A. Yes.

Q. Was the manila envelope inside another bag?

A. Yes.

Q. And is that bag also contained in Govern-

ment Exhibit 2?

A. Yes, it is.

Q. And is that the bag, that exterior bag, that has your name on it?

A. Yes. I put it all in this bag.

Q. I think I may have confused you. The exterior bag of the three contained in Government Exhibit 2, has that got your name and markings on it?

Clark Holden 343

3 for identification appear to be packaged at the time that you recovered them?

A. Well, Items 1, 2 and 3 were packaged together inside a grocery bag.

Q. And how were specifically the items contained in Government Exhibit 3 for identification, how were they packaged in relation to each other?

A. They were packaged one inside the other and then in the manila envelope.

Q. All right. Well, let's go throught it.

First, the plastic bag that you marked which has white powder in it--was that outside something or inside something?

A. That was inside another plastic bag.

Q. What was that inside of?

A. That was inside the envelope.

Q. The manila envelope?

A. Yes.

Q. And those items were all found in a grocery bag in the bathroom?

A. That's correct.

Q. After you marked these items as you've described and placed them in exterior bags--would it be fair to call the exterior bags evidence bags.

A. That would be fair.

Q. All right. Marked them and placed them in the

exterior evidence bags, which you then again marked, and what did you then do with them?

A. This was all done in Sgt. Schlueter's presence. After that, I gave the bags to him, and he placed them in the property room.

Q. Now I'm going to direct your attention to what has previously been marked for identification as Government Exhibit 4 for identfication. And again I'm going to ask you, if you can, to identify the contents of that bag that is marked Government Exhibit 4.

A. Item number 4 is a white powdered substance also recovered from room 124 at Howard Johnson's.

Q. How can you identify the contents of that Government Exhibit 4 for identification?

A. Item number 4 was also marked by me with the case file, the date, the time, and my name on it.

Q. Were there any other items that you recovered as a part of your recovering the bag with white powder in it?

A. Yes, there is. There's additionally a brown paper bag.

Q. What else?

A. A brown paper bag and another plastic bag.

Q. How were those items packaged?

A. The white powder was contained in one plastic zip-lock bag. It was then inside this other plastic zip-lock

bag, and then together those were inside this brown paper bag.

Q. All right. And where was that recovered?

A. That was recovered on the floor of the motel room under the television set in another larger grocery bag.

Q. So the three items in Government Exhibit 4 for identification were in a larger bag that was under the TV set?

A. Yes, sir.

Q. I'd like you to leave the witness stand now for a moment and come to the diagram of Room 124. You may use the pointer if you

like, and show the ladies and gentlemen of the jury where Government Exhibit 4 for identification--or the contents of that, I'm sorry, came from.

A. (Indicating) Number 4 was located in this area. It was by the edge of the counter where the TV sat.

Q. Now, I'm going to ask you to use this green marker, and if you would put the number 4 approximately where it was found.

A. (The witness complied.)

Q. Now, let's go back to items 1, 2 and 3. Would you show us, by putting the numbers 1, 2 and 3, where you found them?

A. (The witness complied.)

Q. And again, those were in all one container, is that correct?

A. That's correct.

Clark Holden 346

Q. You may resume the witness stand. Now, the exterior wrapping which has the marking

of Government Exhibit 4 on it, can you recognize that?

A. Yes, I can. The external wrapping is a plastic packaging that we use, and it is also marked as item number 4 with the case file, date, time, and my name on the exterior.

Q. So did you package these items contained in this exterior evidence envelope?

A. Yes, I did.

Q. Now, did you have occassion to find any other items of possible evidence in that room?

A. Yes, we did.

Q. I'm going to place before you Government Exhibits 5, 6 and 7, and ask you some of the same questions that we've been asking previously.

First of all, directing your attention to Government Exhibit 5 for identification, can you identify that exhibit?

A. Yes, I can.

Q. And how do you recognize it?

A. Item number 5 is another plastic bag

containing white powder that we recovered in the motel room.

Q. I failed to bring up another item that I had intended to. I'm going to place in front of you also Government Exhibit 8 for identification. Now, strictly

speaking about Government Exhibit 5, now, where did you find that exhibit?

A. Number 5 was located on the bed in the motel room underneath the bedspread.

Q. I said, "where did you find it?" I'm not sure you actually found it. Did you find it, or did someone else find it?

A. Sgt. Schlueter was in the room. He removed the bedspread, and at that time I saw item 5 laying on the bed.

Q. All right. Now, the exterior bag that is marked Government Exhibit 5 for identification, can you recognize that bag?

A. Yes, I can.

Q. How can you recognize it?

A. The bag is of the type we use, and it is also marked item number 5 by me with the case file, date, time, and my name.

Q. And did you package the contents of Government Exhibit 5 in that envelope or that package that you now numbered Government Exhibit 5?

A. Yes, I did.

Q. What did you do with that item after you packaged it?

A. After I packaged item number 5 in Sgt. Schlueter's presence, I gave it to him, and he sealed the bag and placed

it in the property room.

Q. Now I'd like you to leave the witness stand again and take up your position in front of our diagram, if you would. I want to give you our handy-dandy green marker here and ask you if you would identify on this

diagram where it was that the contents of Government Exhibit 5 was found.

(The witness complied.)

Q. Now, with regard to Government Exhibits 6, 7 and 8, were they found in one location or in more than one location?

A. Items 6, 7 and 8 were found in one location.

Q. Where were they found?

A. They were found once again on the bed in a Super Valu grocery bag.

Q. You had mentioned earlier that Government Exhibit 5 was found under the covers by Sgt. Schlueter. How about the items 6, 7 and 8 in that Super Valu bag? Were they under the covers and hidden, or were they obvious?

A. They were on top of the bedspread.

Q. All right. Let's turn to Government Exhibit 6 for identification. Can you identify that item?

A. Yes, I can. Item number 6 is a zip-lock plastic bag containing a white powder. It's

marked number 6. It's a little difficult to read, but I have the case file, the date, the time, and my name on item number 6 also.

Clark Holden 351

Q. And what do you recognize it as being? Or how do you recognize it?

A. I recognize item number 9 because I also numbered this item and marked it with the case file, the date and the time, and I also placed my name on it.

Q. When you say "on it", are you talking about the exterior bag or the bags that are contained inside?

A. My name is on the items that are marked on one of the interior bags and also on the outside bag that we placed the items in at the station.

Q. All right. Now, there are several bags that are contained--at least two bags that are contained in Government Exhibit 9 for identification. Can you tell the jury how

it was packaged as it was found?

A. The white powder was inside one of the plastic bags. That plastic bag, in turn, was placed inside the other plastic bag, and then both of these were inside the paper bag.

Q. And all of that is contained in Government Exhibit 9 for identification?

A. Yes, it is.

Q. Where was that recovered from the room?

A. That was also recovered from under the television set area.

Q. All right. If you'd place that exhibit down, then, once again let's show the jury on the diagram with a

Clark Holden 356

A. The other keys--there was also a vest in the room, outside, like a jacket, and there was a large ring of keys in the outside pocket of the vest that was located in the room.

Q. Was it a single ring of keys?

A. No, it was a multiple ring of keys, and there were many keys on different rings which were all, in turn, attached together.

Q. Did you take those items into custody for evidence?

A. Yes, we did.

Q. All right. Now, I'm going to show you what has previously been marked as Government Exhibit 14 for identification and ask you if you can recognize that.

A. Yes, sir, I recognize it.

Q. And how do you recognize it?

A. I recognize it---once again it's marked with the item number by me, the case file, the date, the time, and my name are on both the scale and the container that it's in.

Q. Now, in addition to the scale and the container, both of which you've indicated you've marked, is there some other item in there?

A. Yes, there is.

Q. I see no markings on it, but do you

recognize that item?

Clark Holden 357

A. Yes, I do. The item was in the container at the time of seizure. However, I didn't mark it.

Q. That's a type of paper of some kind?

A. Yes, sir.

Q. Are there any other items that you notice in there?

A. Yes. There's a little rubber grommet item.

Q. Were those items in there at the time that you took this item into evidence?

A. Yes, sir.

Q. Now, this case and the contents of it, the scale part of which you marked, do you know where that was found?

A. Yes, I do know where it was found.

Q. And where was it found?

A. That was also found on the bed.

Q. And was it contained in anything else?

A. The scale was inside the container, which was in turn inside another brown grocery bag.

Q. And where was that grocery bag located?

A. The grocery bag was on the edge of the bed more towards the bathroom, and I saw Sgt. Schlueter reach across the bed and pulled this item across the bed towards him.

Q. Do you know precisely where he found it on the bed?

A. I didn't see the spot exactly that it was sitting

there may be 12 that have now been marked on here--do those 12 items appear to be marked in the location where you found them in the room?

A. They'd be in exactly the same position.

Q. You can resume your seat. Now, since you've anticipated me, I'm going to put Government Exhibit 14 in front of you which has

already been introduced in evidence. Can you recognize that item?

A. Yes, I can. This is a scale that was found in the room, and it's identified by Officer Holden's markings.

Q. Who found that?

A. I found that on top of the bed.

Q. Was it in anything, or was it just sitting there?

A It was in a paper bag, partially covered by either a blanket or a sheet on the one end.

Q. I'm going to ask you to resume your position in front of the chart. And now would you put a 14 at the point on the chart at which you found the scale in the bag?

A. (The witness complied.)

Q. I'm going to show you now Government Exhibits 1, 2 and 3 for identification, which have not yet been admitted in evidence, and ask you if you recognize those items?

A. Yes, I do.

Q. Do you recognize someone's markings on

the various exhibits?

Brian Schlueter 371

time?

A. That's correct.

Q. And you did what with them after that?

A. After they're heat sealed, I put them in our property room and the lockers--they're lettered--letter "I" was the locker that I put them in.

Q. Now I'm going to show you what has been marked as Government Exhibit 4 for identification and ask you the same question. Do you recognize it?

A. Yes, I do.

Q. And what do you recognize it as being?

A. This is a bag of white powder that was found under the television set in the room. The plastic bags were inside the smaller bag, which were inside a larger grocery type bag.

Q. And what about Government Exhibit 5?

A. Again, I recognize it with the number

and Officer Holden's name. This was found on the bed under the covers.

Q. And who found this particular exhibit on the bed under the covers?

A. I found that.

Q. How did you find it?

A. I pulled the bed covers--and I believe it was a bed sheet--back, and it was laying on top of the bottom sheet. The top sheet was laying on top of it.

Q. These two items, did Officer Holden mark them

with you back at the station?

A. that's correct.

Q. Did he then do something with them?

A. Again, like the first three, he put them in the heat-sealable bags, handed them to me, and I sealed them and put them in the same locker, which would have been locker "I".

Q. So again, while one end is just stapled

shut now, at the time it was heat sealed on all sides?

A. That's correct.

Q. Showing you Government Exhibits 6, 7 and 8--6 is a little different than the others in that the exterior bag does not have the Government's exhibit, that is on the interior bag. Can you recognize that interior bag that's marked Government Exhibit 6?

A. Yes, I can.

Q. How do you recognize that?

A. It's a little bit rubbed off. I can recognize Officer Holden's name on it and in the same fashion where it was marked with our case file number and the date.

Q. How about Exhibit 7 for identification?

A. I also recognize this for the same markings.

Q. What about Government Exhibit 8 for identification?

A. I also recognize that due to his markings.

Q. All right. Now were these three exhibits

found

in one location?

A. These three were found in a Super Valu grocery bag. This was a bag that was sitting --the top was open, and it was sitting on top of the bed.

Q. And the location previously identified on that chart is accurate.

A. That's correct.

Q. Back at the station with those three exhibits, did you do something to them?

A. Like the previous exhibits, Officer Holden did mark them, put them in sealable bags, and I in turn took them, sealed the tops with the heat sealer so they're all enclosed, and put them in the same locker, which would have been locker "I".

Q. What about Government Exhibit 8, which is the cup?

A. The cup, we took masking tape--Officer Holden actually taped it. There was some

powder residue in the cup, and he taped the top shut with masking tape, sealed that in there, and marked it. And I put that in the grocery bag.

Q. Now, with regard to Government Exhibit-- I'm sorry, going back to those three exhibits, were they then placed in the evidence locker?

A. That's correct.

Q. What about Government Exhibit 9?

A. I recognize this also. It's a bag containing

white powder. The inner bag was in another plastic bag, which was in turn in the paper bag. It was found by myself under the dresser stand underneath the TV area. And I recognize it also with the markings of the case file number, date and name.

Q. And after Officer Holden had made his markings on that back at the station, and it was packaged, did you do anything with it?

A. Again, he put it in the bag and marked it. I took it, sealed the top it was all sealed, and placed it in the evidence locker.

Q. Again, it is merely stapled at one end, but at the time it was sealed on all sides?

A. That's correct.

Q. What about Government Exhibit 10?

A. again, I recognize this as some type of a sifter device. The green plastic part here was found inside a plastic bag, which was in turn inside this paper bag, and that was located under the television set area of the dresser. It was found by myself also.

Officer Holden marked this. It has his markings, case file number, date. I, in turn, sealed it like the others and put it in the locker.

Q. Now, did you have occassion to do anything else that evening with regard to the events in room 124?

A. After we gathered the evidence at the scene it

are reflected in Government Exhibits 1, 2, 3 and 4?

A. Yes, I did.

Q. All right. And could you tell the ladies and gentlemen of the jury about the weights that you found as to the powders in Government Exhibit 1?

A. In Government Exhibit 1, the weight of the powder was approximately 500 grams. That's somewhat over a pound.

Q. Now, what about Government Exhibit 2? Did you weigh the powder in that exhibit?

A. Yes, I did.

Q. And what was the weight of that?

A. That was approximately 125 grams.

Q. When you say "approximately", so we're clear with the jury, how far away from 500 grams in the case of Government Exhibit 1 and 125 grams in Government Exhibit 2 are we?

A. Well, if I can refer to my notes--in Government Exhibit 1, the weight that I

report is 500.2 grams. In Government Exhibit 2, it's 125.4 grams.

Q. Now, what about Government Exhibit 3? What was the weight?

A. 250.4 grams.

Q. How about Government Exhibit 4?

A. 500.9 grams.

Q. When we're talking about this weight, is this the

weight of the powder and the bag, or just the powder?

A. That would be the weight of the powder.

Q. And did you come to a conclusion as to whether there was any cocaine or any other substance present in Government Exhibits 1, 2, 3 and 4?

A. Yes, I did.

Q. What was your conclusion?

A. My conclusion was that cocaine was present in each of the Exhibits 1, 2, 3 and 4.

Q. Were you able to come to a conclusion as to the relative concentration of the cocaine in those exhibits?

A. Yes, I was.

Q. And what was the concentration of cocaine in those exhibits?

A. In Exhibit 1 where I performed the gas chromotography, the figure I came up with was approximately 98 percent cocaine. There is some experiment there of a few percentage points either way.

In items 2, 3 and 4, the infrared specter that I obtained from those samples indicated that the powders were essentially pure cocaine hydrochloride, meaning that it was probably around 95% or so, at which point had there been any impurities, these would have shown up on the infrared specter. And I saw no impurities.

Q. Then how would you characterize the purity of

By Mr. Vosepka:

Q. Now, directing your attention to Government Exhibit 5, Ms. Wojtowicz, did you examine that through chemical analysis for identification of the contents?

A. Yes, I did.

Q. And did you weigh it?

A. Yes.

Q. And again just referring to the powder, did you weigh that?

A. Yes.

Q. What was the weight of the powder, in Government Exhibit 5?

A. 2,028 grams.

Q. And did your chemical analysis reveal the type of substance that was present in Government Exhibit 5?

A. Yes.

Q. What type of substance?

A. Mannitol, which is a sugar.

Q. Now what about Government Exhibit 6?

Did you weigh the powder in Government Exhibit 6?

A. Yes.

Q. And what was the weight of that?

A. 2,378 grams.

Q. And did you identify through your chemical analysis the type of powder that it was?

A. Yes.

Q. What type of powder was it.

A. Lactose, another sugar.

Q. Government Exhibit 7, did you weigh the powder contained in Government Exhibit 7?

A. Yes.

Q. And what was the weight of that?

A. 219 grams.

Q. Did you determine through chemical analysis the identity of the substance reflected by that powder?

A. Yes, I did.

Q. What was it?

A. Mannitol.

Q. Is that the same substance you described in Government Exhibit 5?

A. That's correct.

Q. Government Exhibit 8, did that have some powder in it?

A. Yes, it did.

Q. And what was the weight of the powder that was in Government Exhibit 8?

A. 6.4 grams.

Q. And did your chemical analysis reveal what type of powder it was?

A. Yes, it did.

A. 10.2 grams.

Q. And did you test it to ascertain the type of substance that was contained in that powder?

A. Yes, I did.

Q. And what was your conclusion on that?

A. I determined that the powder contained

cocaine.

Q. What about Government Exhibit 10?

A. Government Exhibit 10, I found no powders of any type. Therefore, no analysis was performed.

MR. VOSEPKA: At this time I give Government Exhibits 9 and 10 to the defense for their examination. We would offer Government Exhibits 9 and 10.

THE COURT: The record is the same on that? Okay, 9 and 10 are received.

(Government Exhibits 9 and 10 received in evidence.)

By Mr. Vosepka:

Q. Now, during the course of your analysis of these exhibits, did you have occassion to handle the packages as well as the powder?

A. Yes, I did.

Q. Did you handle these exhibits extensively or not?

A. Yes, they were handled quite a bit, first of all, removing all the plastic bags from the cellophane outer wrappers. I also had to apply my initials, the case number.